IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ACCU-SPEC ELECTRONIC
SERVICES, INC.,
Plaintiff

v. CIVIL ACTION NO. 03-394 ERIE

CENTRAL TRANSPORT
INTERNATIONAL, INC. and
LOGISTICS PLUS, INC.,
Defendants

JURY TRIAL - DAY NO. 1

Proceedings held before the HONORABLE

SEAN J. McLAUGHLIN, U.S. District Judge,

in Judge's Chambers & Courtroom C,

U.S. Courthouse, Erie, Pennsylvania,

on Monday, October 17, 2005.

APPEARANCES:

W. PATRICK DELANEY, Esquire, appearing on behalf of the Plaintiff.

JEFFREY D. COHEN, Esquire, appearing on behalf of Defendant Central Transport International, Inc.

W. JOHN KNOX, Esquire, appearing on behalf of Defendant Logistics Plus, Inc.

Ronald J. Bench, RMR - Official Court Reporter

I N D E X

WITNESSES:	DIRECT	CROSS	REDIRECT	RECROSS
FOR THE PLAINTIFF:				
ERNEST CARLSON				
By Mr. Delaney -	73	--	--	--
By Mr. Cohen -	--	114	--	--

- - -

EXHIBITS:	IDENTIFIED	ADMITTED
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P R O C E E D I N G S

(Whereupon, the proceedings began at 8:40 a.m., on Monday, October 17, 2005, in Judge's Chambers.)

THE COURT: With respect to the voir dire, I've reviewed it, it looks fine to me. Unless there are any serious

objections to any questions, I propose to ask each party's voir
dire. We don't have voir dire from you, do we, Mr. Knox?
MR. KNOX: No.
THE COURT: I think we have a number of legal issues
that need clearing up before we get going today. And before we
turn to the question of new versus used and Mr. Cohen's request
for a reconsideration, let me backtrack a little bit and flush
out exactly what the defense is here and what is going to be
admissible and what is not going to be admissible. Now, I'm
talking to Central Transport. Tell me if I have this right.
One of the defenses is going to be, for lack of a better term,
an improper packaging defense, is that right?
MR. COHEN: Yes, that's correct?
THE COURT: In other words, however this thing
should be put on or secured, it's their fault, not your fault?
MR. COHEN: That's correct.
THE COURT: You continue to press a fraud claim
here, a material misrepresentation claim, insofar as -- I'm

losing the term of art, is it rating?

MR. COHEN: Classification.

THE COURT: You talked about this at the pretrial conference, I think you told me that was not a causative agent in the damage?

MR. COHEN: It doesn't have to be causative -- first of all, with respect to that --

THE COURT: Did you tell me that, Mr. Cohen?

MR. COHEN: The information, I read all the deposition transcripts to this point --

THE COURT: Is my recollection correct, that is what you told me at the pretrial conference?

MR. COHEN: I don't remember. With respect to the classification issue and the connection to how freight would be handled, that's not where the focus of the material misrepresentation.

THE COURT: Where does it run to?

MR. COHEN: That runs directly to voidability of the transportation agreement. Essentially, if false information is provided in coming to an agreement, the Carmack Amendment -- borrows somewhat from contract law. It's not a contract, but it borrows from contract law -- with respect to entering into a contract. If materially false information is provided, that provides that a contract can be voidable. The obligations --

THE COURT: In other words, it should have had a

rating of 100, if I understand your theory, rather than 50, is
that correct, given the nature of the freight?

MR. COHEN: Given the National Motor Freight
Classification, it should have had a classification of at least
100.

THE COURT: By virtue of assigning it 50, rather
than 100, how is Central damaged?

MR. COHEN: Central entered into a contract it never
would have entered into but for the material misrepresentation,
this never would have moved.

THE COURT: Forgive my ignorance of the freight
world, tell me why?

MR. COHEN: Why, Central Transport would not have
agreed to move class 100 freight at the freight rate provided.
This is a situation where Central Transport has to -- is a
company that moves freight. They have to cover themselves for
liability purposes. Valuation of freight and valuation is one

component of the classification system. It is a factor that Central Transport must use in determining what rate to charge. To cover themselves for taking on this additional liability. If they're duped, for lack of a better term, it doesn't have to be intentional, it could be a misrepresentation --

THE COURT: If they would have known what they were doing, you said they wouldn't have done it at all. But if it was classified as 100 rather than 50, would they have charged a

different rate?

MR. COHEN: Absolutely. Absolutely we would have charged a different rate.

THE COURT: What do you have to say about this, Mr. Delaney?

MR. DELANEY: First of all, I don't think it has any relevance to the claim we're making. We don't know anything about rates. We don't know anything about what transpired between Logistics and Central. And contrary to some of the suggestions by Central in their points for charge, Logistics is not our agent. We don't control Logistics. We pay them a price, they do what they have to do. They make the arrangements they have to make. So I don't feel that it's, first of all, relevant. Secondly, there's a disconnect here in the sense the depositions reveal that no matter what the rate, the responsibility for the care or the type of care that the carrier uses in moving freight is the same. Third, I'm a bit confused about the suggestion that this is Logistics duping Central Transport. I understand that the rate, rate 50 versus rate 100, has to do with the density of the goods that are being shipped. There perhaps is a presumption that the more dense, the less fragile and, therefore, we will charge less for more dense, less fragile. This was, in fact, a very dense piece of cargo. It took a great deal of force to cause the damage that was caused. And I think that there's a disconnect

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here. So for those reasons --

THE COURT: Excuse me, one second. What does the record reflect was the genesis of or the origin of this 50; wasn't there some familial relationship between someone from Logistics and someone from Accu-Spec?

MR. DELANEY: Sure.

THE COURT: What about that?

MR. KNOX: There is no familial relationship with Central Transport.

THE COURT: Why did they rate it 50 if it should have been 100?

MR. KNOX: Our position, according to the testimony of Mr. Fanzini, our representative, George Horetsky of Central Transport suggested why don't we do it Class 50. There is a conversation like, well, here's one rate -- which, incidentally, Class 100, I think the difference is about 200 bucks. If they got a claim really for about 200 bucks, it's not to void the contract.

MR. COHEN: It's likes telling an insurance company you don't want the premium coverage, you want --

THE COURT: It's not like that, with all respect.

MR. KNOX: As to the issue of duping or material misrepresentation, there is nothing false about the information that we gave to Central Transport, it was in fact a crate.

THE COURT: When all is said and done, if it had been 100, rather than 50, you would have charged a few hundred bucks more for the shipment. That's one of the things that would have happened?

MR. COHEN: That's definitely one, absolutely.

THE COURT: You would have made a little more money. So one of the things that happened, I guess which inures to their benefit, is by your lights they shipped a classification 100 piece of equipment on the cheap?

MR. COHEN: Yeah, that's right. That's absolutely right. That hits it dead on.

THE COURT: Then if that's true, isn't your remedy here today an additional claim against Logistics and/or Accu-Spec for the difference in price between what you would have charged and what you did?

MR. COHEN: Absolutely not. That absolutely is not a remedy here. The remedy here is voiding the contract under Restatement of Torts, under material misrepresentation or fraudulent misrepresentation as defined by the case law, as applied to this scenario. Not just simply extra dollars. That would be putting the cart before the horse. Which would

encourage false classification throughout the industry until
they got cause, then you pay a couple hundred extra bucks, then
you're good to go.
MR. DELANEY: So it voids the contract, I'm not in
privity with him, I have a statutory right to recover the

amount of the damage. Secondly, he never pled fraud, that
other part. And, third, fraud requires justifiable reliance.
If there's an opportunity for you to discover the correct
information, then you're not justifiably reliant. They have
every right, on the part of the motor carrier, to open that
crate and look inside. And indeed they can.
THE COURT: Really, what we're talking about here to
a certain extent, there was a factual predicate established for
it, is a pure question of law, is the contract voidable. Did
you move for summary judgment on this?
MR. COHEN: We have not moved for summary judgment
on this issue.
THE COURT: Was it susceptible to summary judgment
as the record presently sets itself up?

MR. COHEN: The problem here is there is a question of fact with respect to where the Class 50 came from. You heard Logistics position, that's what Mr. Fanzini testified to in his deposition. However, this whole issue rests on what Mr. Horetsky is saying. Mr. Horetsky is the Central Transport salesperson. He's the one that Logistics Plus dispatcher called and they're the ones who communicated about this freight. Mr. Fanzini says that Mr. Horetsky said let's do it at Class 50. Mr. Horetsky completely says that that is incorrect. Mr. Horetsky testified that Mr. Fanzini was asked what freight classification. The genesis of this, originally

someone called for a spot rate. The spot rate does not require a classification to be provided. That rate is necessarily higher because you don't know the class, you have to cover yourself to potential liability. That was the rate that was brought back to Accu-Spec, as we're told through deposition testimony. Then Logistics Plus comes back to Central and says can you get me a better rate. Horetsky says okay, Chris Fanzini what's the class. He says Class 50. Horetsky calls the department in his company, says we have Class 50, origin, destination. A rate is provided at Class 50 based on the information provided by Logistics Plus.

THE COURT: What about Mr. Delaney's point that whatever the legal effect on your contract with Logistics, it doesn't affect his ability to recover?

MR. COHEN: In this case I believe his commentary with respect to the agency issue is wrong.

THE COURT: Well, answer the first question, why is Mr. Delaney's Carmack Amendment claim impacted by your contention that Logistics did you wrong --

MR. COHEN: Accu-Spec basically stands in the shoes of Logistics. By Logistics doing us wrong, Accu-Spec did us wrong. It's the agents. Principals are bound by the acts of the agent. As if Logistics was there telling us the wrong class number. Their actions are the ones that caused this.

THE COURT: So, in essence, the legal principle

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would be that the intentional misconduct in this case, what you contend is the agent, is imputable to the principal?

MR. COHEN: It doesn't have to be intentional, it could be careless and material. As long as it's a material misrepresentation.

THE COURT: What about this, Mr. Delaney?

MR. DELANEY: Let's start with agency. In the Restatement of Agency, Section 14(n), the commentary talks about what is the difference between an independent contractor and an agent. There are independent contractors who can be agents if they have a fiduciary responsibility. People like lawyers. I imagine someone who is contracted to pick up and deliver a product to some other person. That person is an independent contractor, there is no control over the manner in which they accomplish the job. That's exactly the situation here. That's law school principles. To be an agent, you have to be under the control of a principal. We didn't know who the trucker was, we didn't know what Logistics was doing. Logistics didn't provide us with any paperwork. We didn't expect to control it. I'd be very interested to understand how it is with the lack of control that suddenly we are a principal --

THE COURT: Is it in the amendment somewhere, where it defines the legal relationship between a shipper and an entity such as Logistics?

MR. COHEN: The basis of my argument is not with respect to statute, but with respect to basic law on agency. I have from the Pennsylvania Suggested Standard Civil Jury Instructions -- Pennsylvania Suggested Standard Civil Jury Instruction 4.00B, is the number 13 jury instruction request submitted by Central.

THE COURT: What does it say?

MR. COHEN: It says "agency is a relationship that is created when one party, called a principal, obtains another party, called an agent, to perform services for him or her and to act on his or her behalf, but subject to the principal's right of control. A principal is bound by, and liable for, the acts his or her agent does with actual or apparent authority from the principal, and within the scope of the agent's employment. an act is considered within the agent's authority if:

(1) the principal granted express authority to perform the act; or

(2) the act was proper, usual, and necessary to exercise of the authority actually granted by the principal; or

(3) the principal's words or conduct would lead a reasonably prudent person to believe that the principal has granted the agent the authority to perform certain acts or if the principal puts the agent into, or knowingly permits the agent to occupy, a position in which, according to ordinary

experience and habits, it is usual for the agent to have authority of a particular kind. In determining whether the agent had apparent authority, you should look to the actions of the principal, rather than the agent. However, a third party is not entitled to rely on the apparent authority of the agent if he or she has actual knowledge of the limitations of the agent's authority or

(4) the principal knew or should have known that the agent was exercising powers not granted to him or her but the principal fails to take reasonable steps to notify others of the limitations of the agent's authority, and a third party justifiably changes his or her position based on his or her

reasonable belief that the agent possesses the authority."

We go on to say, "if you find that Logistics Plus was acting within the scope of its authority with the principal, Accu-Spec is bound by and liable for the acts of Logistics plus."

THE COURT: One last question on this subject, then I'm going to move on to some others. Who was it from Accu-Spec that spoke with someone from Logistics about the rate?

MR. KNOX: George Horetsky. Jim Mullen.

MR. DELANEY: There's only a discussion between Logistics and Central --

THE COURT: I misspoke.

MR. KNOX: I don't know that the record flushed out

that there was a discussion of rate --

THE COURT: Logistics and Central, is the way the record is set up on rate discussion?

MR. COHEN: Class discussion.

MR. KNOX: There's clearly discussion on rate with Accu-Spec and Logistics and Logistics and Central. I don't

think there's anything in the record that shows that there was
a discussion with Accu-Spec and Logistics --
THE COURT: Finally, on the subject of
misrepresentation, as you laid it out, would it be accurate to
say that in large measure the viability of that legal theory
turns upon the viability of your agency versus principal
theory -- as far as it would affect Accu-Spec's recovery?
MR. COHEN: I don't know that to be accurate.
Because Central only had contact with Logistics.
THE COURT: Let me see if I can ask the question
differently and maybe I can get an answer from you. If
Accu-Spec is not Logistics principal, do you have -- does your
fraud claim insulate you from Accu-Spec's claim?
MR. COHEN: Well, if Logistics wasn't the agent --
THE COURT: That's the flip side.
MR. COHEN: If Logistics wasn't the agent of
Accu-Spec, Accu-Spec would be the party entering into an
agreement with misrepresentation.
THE COURT: Let's go on to some other issues.

Besides the packaging defense and besides the issue we've just discussed for sometime now with a misrepresentation defense, what other substantive defenses to the claim does Central intend to present?

MR. COHEN: The next one speaks to a 10 cents per pound for used --

THE COURT: For the record, at our last get together on the record I ruled on the issue of whether or not this machine was used under the tariff. And concluded, for the reasons I put on the record, that it was not. I received subsequently a motion for reconsideration or clarification from Central. The upshot essentially being that there may have been a misunderstanding that it was not Mr. Cohen's intention to stipulate, nor did he stipulate to the underlying predicate facts upon which my opinion was based. And I went back and took another look at that, and in fairness to Central and Mr. Cohen, having read it carefully, I think that a reasonable reader could reach that conclusion. That said, it begs this question. What is the appropriate forum to resolve this issue as to -- in other words, what is the appropriate forum to get the facts on record that I had found had been stipulated to in

that hearing, i.e., is it a quick motion in limine with me or
is it an issue for the jury; that's my first question. Since
you had the motion there, Mr. Cohen, why don't you go ahead and
enlighten me on that?

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MR. COHEN: Well, I guess the question -- they
blend, it's a mixed question.
THE COURT: Maybe I could advance all our causes by
asking you this. Do you have any evidence to the contrary?
MR. COHEN: Yes. The lawyers were doing a lot of
testifying at that hearing, with respect to hours of usage, the
lifetime of the machine. I was providing information about
discounts.
THE COURT: That's why I'm granting your motion for
reconsideration, I'm going to give you a chance to prove this
up one way or the other. To put a finer point on this, do you
have any evidence which would refute -- assuming that Mr.
Delaney has the evidence, do you have any evidence to refute
the contention that this thing has a natural life span of
something like 15,000 hours and was used less than 12?

MR. COHEN: In deposition of the Dage people on this topic it was not flushed out. I had a conversation with Dage --

THE COURT: I'm not talking about back then, I'm talking about what's about to happen right here today. Is Central in a position, assuming that Mr. Delaney puts on proof -- you have the burden on this issue, by the way, to establish that it was used -- do you have any competent evidence where you can prove up anything one way or the other as to the use of the machine, actual use of the machine or its

expected life use?

MR. COHEN: I anticipate testimony with respect to the use of the machine. We talked about 12 hours. That could be 12,000 X-rays. This information can come to the jury as 12,000 X-rays. It could be more than 12 hours. The life span, it could be less. It could be more, I don't know. But we need to flush that out, to get actual record evidence.

THE COURT: How would you propose we do it -- are all your principals here that would be conversant on this point this morning?

MR. DELANEY: The gentleman who would testify as to usage is Joe Fisher. He's currently in Austin, Texas. We've made arrangements to video conference him.

THE COURT: When would he be here?

MR. DELANEY: Tomorrow. Do you want me to offer what he would say?

THE COURT: First of all, my first question is this. It strikes me that this is a motion in limine kind of issue, that I can do the fact finding if I have some facts in front of me from some live people or witnesses or affidavits. And then assuage Mr. Cohen's concern that he was being dragged into a stipulation that he did not agree to. Does anyone disagree that that is the appropriate mechanism to resolve this?

MR. COHEN: I think that we're here, we have a jury, we're already going to have called witnesses today. I think

this question can just as easily go to the jury.

THE COURT: In other words, as the verdict form would shape itself up, what would the jury be asked to find?

MR. COHEN: The jury would be asked -- the jury would be asked to find is the machine new or used pursuant to Central Transport's tariff. If it's used, it's $528.

MR. DELANEY: That's an overarching issue that doesn't apply to me. It applies to the relationship between these parties. I'm not a principal of this party. I'm not in privity with Central Transport, I have a statutory right to an amount of money from them and/or from Logistics. So I don't know anything about tariffs. And I don't know about limitation of damages. And, in addition, the case law makes it clear that, especially I think Third Circuit case law makes it clear that the consumer must have been offered an opportunity of different rates in order to trigger the limitation of damages that are suggested by Central. Our testimony will be we got one price, that was the price we accepted, and that was the end of the discussion.

THE COURT: Are you saying as a matter of law a shipper, such as you, is not bound by the tariff where there's a middleman such as Logistics?

MR. DELANEY: We're not offered different rates for different levels of liability or damage exposure by the shipper, that's right.

THE COURT: We spent some time on this at the last argument, given the way it turned out, I didn't have to rule on it, do they have to offer different rates?

MR. COHEN: The shipper, per the law, they have to provide different rates, sophistication, prior course of dealings goes into that. In this case I went on for a very long time about the tariff, how the tariff --

THE COURT: I went back and even rereading it, I was hopelessly lost in the trees. Cut right to the chase.

MR. COHEN: The shipper is bound by the bill of lading. The shipper is to familiarize himself with all the terms and conditions of the bill of lading. The bill of lading incorporates these other documents.

THE COURT: Did you ever get the bill of lading?

MR. DELANEY: No, it went from Logistics to Central. When this was delivered to us, I believe that we were given a bill of lading, I don't know if it's that particular bill of lading from Logistics or there's one from Central Transport after the equipment arrived.

THE COURT: How are they meaningfully given a choice of freight rates then.

MR. COHEN: Accu-Spec?

THE COURT: Yes.

MR. COHEN: Accu-Spec relied on Logistics Plus to communicate with Central Transport. Central Transport didn't

reach around Logistics to get to Accu-Spec.

MR. DELANEY: Judge, I have a suggestion. One thing that could be dealt with here with the people that we have is the issue of whether there is agency or not. I mean, Mr. Mullen will be here this morning.

THE COURT: Let me ask you this on the question of agency. It strikes me that there really isn't any dispute, factual dispute, is there, as to the background relationship here, why isn't this a pure question of law, what more do I need to know -- Mr. Cohen put it his legal position, but the actual relationship in the real world between these parties against which I would judge the appropriateness of independent contractor or principal, there's no real factual dispute, is there?

MR. DELANEY: I don't believe there is.

THE COURT: There really isn't, is there, Mr. Cohen, what am I going to hear from anybody beyond what I already know?

MR. COHEN: What you know from the lawyers talking or from depositions?

THE COURT: What would I hear from any of these witnesses that I haven't already heard from you folks; in other words, is there any disagreement on the facts that would form the basis for my legal conclusion as to whether there's an independent contractor status or principal status?

MR. COHEN: I don't think so.

THE COURT: What else, Mr. Delaney, anything else?

MR. DELANEY: Well, I'm sorry, I jumped ahead and suggested that's a way to simplify things. I don't think that there was anything else on the legal issues.

THE COURT: Insofar on this question of new versus used, I am inclined, hearing no significant objection, I see no significant problem with it. My view on this is we'll get out of the blocks, I'm going to let people put in evidence on this new versus used question out there. One of two things will happen. Either there will be sufficient evidence to go to the jury on the point or there won't. But I'm going to give you an opportunity, since you have the burden of proof, to put some evidence in on that. Of course, I suppose that begs the underlying question as to whether the tariff is enforceable at all as against Accu-Spec.

MR. COHEN: Your Honor, with respect to the sort of our agreement that our argument today is all that you need to hear with respect to agency. If that's going to be the case, let me complete my argument respectfully if that's okay.

THE COURT: You can in a minute, hold your thought. If your tariff new versus used business is not enforceable as against Accu-Spec, is it of any moment to you, is it still an important issue?

MR. COHEN: Well, that begs the question whether new

versus used is enforceable I believe against Logistics Plus.

THE COURT: That was my next question. How does it benefit you if it does not impact Accu-Spec?

MR. COHEN: We believe that there is no way it can't impact Accu-Spec. Accu-Spec can't avoid all written materials governing transportation.

THE COURT: I understand your position, Mr. Cohen, I truly do. I haven't ruled on that issue because it was unnecessary for me the first time. My question is if you're wrong on that point, does it in any sense materially still inure to your benefit vis-a-vis Logistics?

MR. COHEN: I'm sorry, your Honor, I'm a little confused on what your question is.

THE COURT: That's all right because I think I am, too.

MR. DELANEY: I'm going to help Mr. Cohen here. The statute does have a section about apportionment. I suppose contractually there can be contractual apportionment, too.

THE COURT: Well, do you have any defense on this, on the merits?

MR. KNOX: Yes.

THE COURT: What is it?

MR. KNOX: As you know, once they make their prima facie case, the burden shifts to us to prove we were not negligent --

THE COURT: That this was some kind of act of God?

MR. KNOX: Act of the shipper being the most important one.

THE COURT: What are you going to try to prove up insofar as Accu-Spec is concerned?

MR. KNOX: The act of the shipper here is their failure to tell us that this was a valuable, $120,000 machine. And that omission caused this whole problem. Everybody took a different position accordingly. That's not just some technical argument, that is the whole shooting match.

THE COURT: In other words, you didn't know what you were shipping, right?

MR. KNOX: Exactly. And the shipper, both Dage and Accu-Spec, step in the shoes of the shipper -- there's testimony that the truck driver, Dale Meabon and George Horetsky, their belief is that the freight shifted in transit.

THE COURT: That's kind of tandem to what he's saying about improper packaging.

MR. DELANEY: It's not fragile. It was marked fragile with a wine glass on the side of the crate, it's not fragile. It's 5,200 pounds of steel and lead. It was so abused --

THE COURT: Why did they put a wine glass on the crate?

MR. DELANEY: They dropped it so badly, that it took

the steel ledge or desk and bent it. They dropped it so badly, that Dage said, for God sakes, don't turn it on, if they've comprised the lead shield, you're going to get a lethal dose of radiation.

THE COURT: All that having been said, there's nothing wrong with him making the argument that you --

MR. DELANEY: If it had shifted.

THE COURT: That's fair game. I suppose it's fair game if your position is that it was a fragile machine, you can bark up that tree with the jury if you want to. You just put on the proof you want to.

MR. DELANEY: Sure.

THE COURT: Anything else then?

MR. KNOX: Those are the two main points.

THE COURT: All right. Who do we have here today that's going to get out of the blocks and testify?

MR. DELANEY: I have Ernie Carlson, who is the president and one of the owners of Accu-Spec. And I have Jim Mullen, who was an employee of Accu-Spec. He had interface with Logistics. And then tomorrow I have Joe Fisher from Dage, who was the supervisor of the California facility.

THE COURT: Would do you have, who do you have witness wise?

MR. COHEN: We have three witnesses. We're going to have George Horetsky, the salesperson. Jeff Cackowski and Dale

Meabon.

THE COURT: Okay. How about you?

MR. KNOX: Jim Berlin, the CEO of Logistics Plus, and we have Chris Fanzini.

THE COURT: We'll finish this on Wednesday, is that what everybody is thinking?

MR. DELANEY: Easily.

MR. KNOX: Yes.

MR. COHEN: If possible, with respect to Dale Meabon. He's a truck driver. If he can go in the morning, that is appreciated, he sort of losses money --

THE COURT: We'll do our best to try to accommodate him under the circumstances. Is there anything else that needs to be called to my attention?

MR. DELANEY: Just a couple of issues, we've talked about the witnesses. I would intend to read into the record pleadings. And in particular, a couple of paragraphs, three paragraphs I think of the complaint, and three paragraphs of Logistics answers where they admit that they're a freight forwarder. There's also an admission in the pretrial narrative statement of Logistics that this product, this package was not damaged in California when it was turned over, in the process of turning it over to Central Transport.

THE COURT: I'm sorry, from who?

MR. DELANEY: From Logistics. It's a statement in

the pretrial narrative statement, this product was not damaged
when it was turned over.

MR. COHEN: That's hearsay.

MR. KNOX: That's not an admission.

THE COURT: I'm not going to bind a client with a legal representation by a lawyer in a narrative. Requests for admission or something along those lines, yes.

MR. DELANEY: I have a series of cases, that include the Western District of Pennsylvania, two cases out of the Western District -- suggesting, however, even if it's not an admission, it can be read to the jury, that they're bound by that statement. That they're bound by the statements they made in a pretrial narrative.

THE COURT: I'll look at the cases.

MR. COHEN: Just to make it clear, I don't know how, this is a statement potentially made by Logistics Plus, how it would potentially bind Central Transport as well, be used against Central Transport. If I may, your Honor, what is the statement?

MR. DELANEY: The statement is the package wasn't damaged -- the product wasn't damaged in California --

MR. COHEN: That is complete hearsay, it can't bind Central, Central didn't say it.

THE COURT: I didn't suggest it and I wouldn't --

MR. COHEN: There is no evidence to suggest it.

THE COURT: Don't look a gift horse -- you have a very unfortunate habit of never knowing when good news is coming down the track. When the wind is blowing in your direction, be quiet. You wouldn't be bound by that no matter how I rule on this, you couldn't be bound by this. What else, Mr. Delaney?

MR. DELANEY: I have a package of two exhibits that I want to put in. The last of which I think potentially is an evidentiary issue or authentication issue. The last of which is the straight bill of lading that was issued by Logistics, that was signed by the Central Transport trucker on February 5, 2003. I received this when it was produced in response to a request for production of documents. I just want to make sure nobody is going to harp about being admissible.

MR. KNOX: No, I don't have any problem.

MR. COHEN: I should bring up we may introduce Logistics Plus Web site.

THE COURT: Let's solve one thing at a time -- is there any objection to what he just showed you?

MR. COHEN: No.

THE COURT: There is something that I forgot. I'll think about these other questions and rule on them before we get started. But we need to tell the jury a little bit what this case is about.

MR. DELANEY: My suggestion would simply be that

they be told that it's a property damage case relating to a piece of equipment that was being shipped across the country. The plaintiff is the owner of the equipment and the defendants are the parties who arranged for shipping, were transporting the goods.

THE COURT: What I would propose to do is I would propose to co-op in large measure Mr. Cohen's first paragraph, and after the first paragraph simply say that Logistics Plus and Central Transport contend that they are not responsible for the damage allegedly sustained -- let me say that again, Logisitics Plus and Central Transport contend that they are not responsible for any damage to the X-ray machine.

MR. DELANEY: I respectfully suggest you avoid that. We don't have to prove negligence. We don't have to prove any of the detail that relates to the carriage of this.

THE COURT: It is their burden, once you've established a prima facie case, to come forward, and that's just another way of stating what they intend to prove by way of their burden. They have to demonstrate by a preponderance of the evidence that they weren't negligent and for some other reason something else happened. So what's wrong with that, you want me to tell the jury they admit they damaged the machine?

MR. DELANEY: I guess just the idea that they're denying liability is all.

THE COURT: That's what I'm going to tell them.

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MR. COHEN: Your Honor, there's one item that we should address, I wanted to bring to your attention. Central

Transport objects to many of the proposed jury charge. I presume you may want to address that at a different time?

THE COURT: Your presumption is correct. We're going to have, it's my practice to kind of put together a draft charge and we'll sit down and have a charge conference. It's far too early in the game to do that right now.

MR. DELANEY: Also, on our schedule, judge, I had scheduled the video conference of this gentleman in Texas, that was going to occur at 1 o'clock our time tomorrow. I'm trying to get him at 9:00 a.m. or about 9:15 tomorrow morning, so we can just keep moving.

THE COURT: Where is he?

MR. DELANEY: He's from California, he's in Texas.

THE COURT: We're going to try to do him at 9:15?

MR. DELANEY: I hope to know this afternoon and I'll let everyone know of course.

MR. COHEN: If I could bring up our exhibits, your Honor. We may introduce the Logistics Plus Web site. It's attached to Exhibit 1 on depositions, I'll give you guys a copy, so you can have it in advance. And possibly with respect to Dage, their trade show schedule. It's the current trade show schedule.

MR. DELANEY: We know exactly what trade shows this

product went to. It went to one, if that's what you're concerned about.

MR. COHEN: I'm just proposing this exhibit with respect to trade shows.

THE COURT: What is the relevance?

MR. COHEN: This would show these machines travel to trade shows when they're demos.

MR. DELANEY: We'll have the actual history of this machine.

THE COURT: I'll withhold ruling on this until we see a witness up on the stand, when he's going to use the exhibit and question him about it, I don't have to do that right now.

(Recess in Judge's Chambers from 9:25 a.m.; until 9:40 a.m.)

MR. KNOX: Judge, I went up to Attorney Delaney beforehand to raise the issue about freight forwarder. We are

not going to be making an issue of this in terms of
distinguishing our status as freight forwarder versus -- he had
indicated to me, in light of that, perhaps he's not going to
address whatever portion of the pleadings he was going to read
on this issue. In turn, I merely mentioned what I may do is
read paragraph 12 of Accu-Spec's complaint, quote it in my
opening statement, that Accu-Spec believes Logisitics Plus
should have identified the X-ray machine as Class 100 cargo,

meaning cargo which was fragile and needed to be transported
with a higher degree of care than metal castings required.
I'm going to say that in conjunction with the Carmack
Amendment. That's their theory on why we should be held
liable.
MR. DELANEY: I said to him, first off, I don't
think it's a party admission the way it's phrased.
THE COURT: Where's it coming from?
MR. KNOX: Paragraph 12 of the complaint.
THE COURT: Your complaint?
MR. DELANEY: My complaint.

THE COURT: Why can't he read your complaint?
MR. DELANEY: I don't think it's a party admission the way it's phrased, upon information, upon investigation or something to that effect. In addition to that, it's not my theory. I don't have any theory about fragile versus non-fragile.
MR. KNOX: That was in the complaint.
THE COURT: I'm going to let you read it. You can't try to disassociate, it's a pleading. Or bring in Mr. Pendleton, see what he would say about it. Okay, now just to clean up two other loose ends, then I'm going to get this jury panel up here. On the question of misrepresentation, insofar as it relates to Logistics, not Accu-Spec but Logistics, your theory is that the misstatement was material and had you known

it, you would not have entered into the contract, is that right, in essence?
MR. COHEN: Yes.
THE COURT: The theory being the contract, if you accept the underlying facts, is voidable as a matter of law, is

that right?

MR. COHEN: That's true.

THE COURT: I'm going to rule on Accu-Spec in a minute. I'm inclined to let you, the party having the burden by clear and convincing evidence, to try to prove up this fraud claim against Logistics. My only question is at the end of the day, if I submit special interrogatories to the jury, with respect to each, do you find that there was a material misrepresentation made, for instance. Do you find that you detrimentally relied upon. Isn't it a pure question of law for me to declare -- in other words, what is a jury declaring a contract void for, that's my province, that they do need to do the underlying factual findings?

MR. COHEN: The jury needs to give those facts.

THE COURT: Then it would simply be a question, not part of the jury's province, to declare the contract void?

MR. COHEN: I believe so.

THE COURT: Then what we're going to do is -- let me clear this. Insofar as the issue on agency is concerned -- this is an order. After carefully considering the parties arguments and, in particular, the fact there is the agreement that there are no material facts in dispute insofar as it relates to the relationship between Accu-Spec and Logistics, I'm of the opinion that as a matter of law Logistics acted as an independent contractor vis-a-vis Accu-Spec. And because primarily, not necessarily exclusively, the record here reflects that Accu-Spec exercised no control or dominion over the manner in which Logistics performed its duties. The flip side of that is that the record reflects that Logistics at all material times had complete autonomy as to the manner or method in which it would accomplish its purpose. Insofar as Central's, one of Central's defenses being the question of fraud, given my ruling on the lack of an agency relationship vis-a-vis Logistics and Accu-Spec, any potential fraud does not negate a claim by Accu-Spec. However, I'm going to permit Central to introduce evidence to attempt to prove by clear and convincing evidence its theory that it was duped into entering into a contract with Logistics based upon Logistics misrepresentations. It seems to me as a matter of law if Central is successful in proving up that case, then liability, if any, rests exclusively with Logistics. Because the contract would have been voided and no further liability can run down stream by way of contribution or indemnity. All right, let's go.

(Recess in Judge's Chambers from 9:44 a.m.; until

12:00 p.m.)

THE COURT: Tell me what the cause issue is; first of all, what's the juror's name and number we're talking about?

MR. DELANEY: Mary Lou Rosio, and she's number eight I think in the pool sequence.

THE CLERK: Seat number 12 in the jury.

THE COURT: Mr. Paulis informs me that there is a dispute on whether she should be dismissed for cause; what is the issue?

MR. DELANEY: She works as a corporate buyer at Snap-Tite. And Snap-Tite engages the services of Logistics Plus. She sits next to, in her office sits next to the representative of Logistics Plus on a daily basis and they have some interaction. She also indicated that one of the officers from Snap-Tite, I think she said went to work for Logistics

Plus. We followed up with a question about whether that would affect her ability to be fair and impartial. Quite frankly, she hesitated about that. And said I think I could be but, you know, it might have --

THE COURT: Does Logistics Plus have a personal representative at Snap-Tite's office?

MR. DELANEY: That's their business. If they can get all the freight work for a corporation, they run the shipping.

THE COURT: All right, bring her in chambers.

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(Whereupon, Juror Mary Lou Rosio enters Judge's Chambers.)

THE COURT: Would you be so kind as to indicate your name and your juror number for the court reporter, please?

JUROR NO. 8: Mary Lou Rosio, juror number eight.

THE COURT: Now, I understand you would work at Snap-Tite, is that right?

JUROR NO. 8: Yes.

THE COURT: Do I have it correct that you have a person who sits next to you that works for Logistics?

JUROR NO. 8: Yes.

THE COURT: Who is that just for the record?

JUROR NO. 8: Stephen Adiska.

THE COURT: Are you friends or acquaintances, obviously, acquaintances -- are you social friends with this person?

JUROR NO. 8: We sit next to each other at work, we socialize to a certain degree at work.

THE COURT: The critical question is this, since you know Logistics is one of the parties to this case, let me just put it right out for you. The question would be would you have any hesitation, no matter how minimal, as to whether you could be completely fair and impartial in this case, given the fact that you apparently on a daily basis are closely associated with an employee of Logistics?

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JUROR NO. 8: Yes, I probably would.

THE COURT: Have some --

JUROR NO. 8: Have some difficulty.

THE COURT: I appreciate your candor. What I'm going to do is I'm going to dismiss you. You haven't done anything wrong, you've been very candid in your responses, that's what we're looking for. All right, thank you.

(Juror excused from Judge's Chambers.)

THE COURT: I'm going to tell the jurors we're going to take a break for lunch before we continue.

(Whereupon, the proceedings recessed at 12:05 p.m., in Judge's Chambers; and at 1:50 p.m., reconvened in Courtroom C.)

THE COURT: Swear the jury, please.

THE CLERK: If you could please stand and raise your right hands.

(Whereupon, the Jury was sworn.)

THE COURT: Members of the jury, now that you have been sworn, I'll give you some preliminary instructions to guide you in your participation in this case. Now, it's going to be your duty to find from the evidence what the facts are. You and you alone are the judges of the facts. You will then have to apply those facts to the law as I give it to you. And as I told you earlier this morning, you must follow the law whether you agree with it or not. Nothing that I may say or do

during the course of this trial is intended to indicate or should be taken by you as indicating what your verdict should be.

Now, the evidence from which you will find the facts will consist of the testimony of the witnesses, documents and other things received into the record as exhibits. And any facts the lawyers agree to or stipulate to or that I may instruct you to find.

Now, certain things are not evidence and must not be considered by you, and I will list them for you now. Statements, arguments and questions by lawyers are not evidence. Objections to questions are not evidence. Lawyers have an obligation to their clients to make objections when they believe that evidence is being offered for an improper purpose under the rules of evidence. You should not be influenced by the objection or by my ruling on it. If the objection is sustained, ignore the question. If it is overruled, please treat the answer like you would any other.

If you are instructed that some item of evidence is received for a limited purpose only, then you must follow that instruction. Testimony that the court has excluded or told you to disregard is not evidence and must not be considered by you. Anything that you may have seen or heard outside of the courtroom is not evidence and must also be disregarded. You are here to decide the case only on the evidence presented in

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the courtroom.

Now, there are two types of evidence, direct and circumstantial. Direct evidence is direct proof of a fact, such as testimony of an eyewitness. Circumstantial evidence is proof of facts from which you may infer or conclude that other facts exist. Now, I'm going to give you instructions on these, as well as other matters, at the conclusion of the case. But for present purposes, simply bear in mind that you may consider both types of evidence. It will be up to you to decide which witnesses to believe, which witnesses not to believe, and how much of any witness's testimony to accept or reject. I will also give you some guidelines for determining the credibility of witnesses at the end of the case.

Now, this is a civil case. Which means that the plaintiff has the burden of proving its case by what is called the preponderance of the evidence. That means that the plaintiff has to produce evidence which, considered in light of all the facts, leads you to believe that what the plaintiff claims is more likely true than not. To put it differently, if you were to put plaintiff's and defendant's evidence on opposite sides of the scales, the plaintiff would have to make the scales tip somewhat on his side. If the plaintiff fails to meet this burden, the verdict must be for the defendant.

At the conclusion of the case I'm going to give you some rather specific instructions on the burden and burden

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shifting in this case. I'm not going to do it now, but you're going to get further detailed instructions on the burden of proof.

Now, those of you who may have sat on a criminal case will have heard proof beyond a reasonable doubt. That requirement does not apply to a civil case and, therefore, you should put that out of your mind.

A few words about your conduct as jurors. First, I instruct you that during the trial, as I told you earlier today, you're not to discuss the case with anyone or permit anyone to discuss it with you.

Second, do not read or listen to anything touching on this case in any way.

Third, don't try to do any independent research or undertake any investigation about the case on your own.

And, finally, do not form any opinion until all the evidence is in. That is to say, it's very important you keep an open mind until the conclusion of the case.

If you wish, you may take notes. And I will see to it that you are supplied with legal pads and pens for that purpose. If you do decide to do that, I would ask that you leave them in the jury room each night and remember that they are really only for your own personal use.

Now, the trial is about to begin. First, each side may make an opening statement. Remember that an opening statement is neither evidence nor argument. It's simply an outline of what that party intends to prove offered to help you follow the evidence. Next, the plaintiff will present its witnesses and the defendants may cross-examine them. Then the defendants will present their witnesses and the plaintiff may cross-examine them. After that, the attorneys will make their closing arguments to summarize and interpret the evidence for you. And thereafter that I will give you my instructions on the law.

Mr. Delaney, are you ready to go?

MR. DELANEY: I am, your Honor. May it please the court, good afternoon, folks. I was introduced to you earlier, but I'm sure you don't remember who I am. My name is Patrick Delaney, and I'm here on behalf of the plaintiff in this case. And that's a company, a company by the name of Accu-Spec. With me at the table is Ernie Carlson. Mr. Carlson is one of the owners of Accu-Spec, and an officer of the company.

This case involves events that occurred back in 2003. And at that point in time Accu-Spec was employing about -- I'd say about 100 people, out in McKean, towards Edinboro. And they are in the business of making components for electronic equipment. Things like MRI machines. They make circuits boards, do the assembling. They construct circuit boards. Not very big items, maybe the biggest might be 20 by 20 inches.

And back in 2002, they decided that they would like to make an investment in better quality control in their company. So they decided to buy an X-ray machine. But not the kind of X-ray machine that you have in a hospital, an industrial X-ray machine. Essentially, it would allow the quality control people to look at the work that had been performed at Accu-Spec to make sure it was done well.

So Ernie Carlson will testify in this case. He'll tell you that sometime in 2002 they began to look around to where they could buy this kind of a machine. They went to a trade show in Chicago. And they met some people from a company by the name of Dage, D-a-g-e. Dage is a company from the United Kingdom and they manufacture these X-ray machines.

So Mr. Carlson and other people from Accu-Spec began to talk to Dage, and decided that they had the type of machine that they wanted to buy. So they got a quote. This machine is not cheap, it was about $135,000, for a new machine. They began to dicker or negotiate with regard to the price.

And the salespeople from Dage said look, we can get down to $120,000. We have a machine that is out in California, we have a facility in California, the people from Dage said, and that is used to show customers how the machine works. So they said it was a demo of sorts. I think you'll hear that the machine was only a matter of months old at the point in time when we agreed, we at Accu-Spec agreed to buy it. But we

reached a price of $120,000.

As part of that transaction, Accu-Spec was to arrange the shipment from California to Pennsylvania, to Erie, Pennsylvania, to McKean, Pennsylvania. Mr. Carlson will tell you that what he did is he went to one of his employees, Jim Mullen. Mr. Mullen is in the courtroom, he'll testify here. He went to Mr. Mullen and said look, work on this, make the arrangements for shipping.

Mr. Mullen will tell you, and Mr. Carlson will say the same thing, that while Accu-Spec ships products all the time, it's usually via UPS. This X-ray machine is a big piece of equipment and required a motor carrier, a trucking company, essentially.

What Jim Mullen did, though, instead of going to a trucking company and getting any kind of a quote, he went to a company locally by the name of Logistics Plus. And they're one of the defendants in this case. Logistics Plus is a freight forwarder. They don't handle the product. You pay them your money, they take care of all of the arrangements. They hire a trucking company. And they pay the trucking company. And they take care, as the name implies, the logistics of the transporting.

So Jim Mullen, and it's interesting, Jim Mullen's son-in-law worked for Logistics Plus. He called his son-in-law and said look, I got this piece of equipment that needs to come

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from California. So Logistics Plus was happy to do this.

What information did they exchange. Mr. Mullen will tell you that he told the people at Logistics Plus we need a piece of equipment sent across the country, it weighs a lot.

This is not a small box, it's a crate. And I think you'll hear that the crate is perhaps eight-feet tall, six-feet wide and six-feet deep. It weighs more than two tons, 5,200 and some-odd pounds.

So he told him that information. He told the people at Logistics Plus that information. He told him where it needed to be picked up. It needed to be picked up at the Dage facility in Fremont, California, which is near San Francisco. He told them when they needed it in Erie, when they needed it in McKean, Pennsylvania. And that would have been February 14, 2003. That's when they needed the shipment to come in.

Logistics Plus gives a price. And the people at Accu-Spec said fine, that price is good. Logistics Plus talks to a trucking company, Central Transport. We don't know that at Accu-Spec, they do that work. They make arrangements with Central Transport to pick this piece of equipment up. It's going to be picked up, I think February 5, 2003. They tell them we need it shipped to Pennsylvania, it has got to arrive here on February 14th. All right. Central Transport takes on that job.

We don't receive any kind of paperwork, all we know is it's going to cost us X dollars. It's going to cost us about $600 for the shipping. We don't have any direct contact with the people at Central Transport.

Here's another thing. You'll hear about a truck picking up this piece of equipment in the San Francisco area. It's not the same truck that delivers it here in Pennsylvania. It goes through a series of vehicles apparently to get here. You'll hear I think the driver that delivered the machine on February 14th. He isn't the same driver that's out in California on the 14th, or on the 5th of February. So there's a series of stops and changing of vehicles and that sort of thing.

So let me take you now to February 5, 2003. At the Dage facility out in California, they have crated this piece of equipment. Inside the crate, I think I told you the crate itself is perhaps eight-feet tall. This machine, and you're going to see pictures of it, this machine looks like it's six or seven-feet tall, maybe six-feet wide and deep.

The machine is in a crate, it's a box, a wooden box, that is bolted together. They literally use what I call a lag bolt, it's got a bolt and a nut that goes through openings in the wood, that ties this crate together and that's how they ship it. It is snug, there is no wiggle room inside this crate. That may become important as you listen to this case.

It has a floor, the crate has a floor. So it isn't just a machine on the ground. It is not locked or sealed. There is no shrink wraparound on the outside of the box. There is no lock device on any of the bolts. You'll hear that if you have a wrench and five minutes, you can open one of the panels and look inside if you want to look inside.

There will be, as I said, there will be testimony that this crate is very substantial, it is built with four-by-fours, two-by-four pieces of lumber, and you'll see some pictures of it. So you'll see it's a very substantial piece of packaging. And, again, the machine is extremely snug inside. You have a 5,200 pound piece of equipment on the inside, it's not going to flop around on the inside.

Now, we don't know what happens between February 5th and February 14th. The next piece of the story that we know is that we understand the machine is to arrive at McKean on February 14th. Ernie Carlson is at the plant, Jim Mullen is at the plant, and the truck from Central Transport arrives that morning.

That's the first time we know anything about Central Transport. We don't know who the trucker is. But it arrives at our facility in McKean. They're going to unload this piece of equipment and put it in the plant. Now, Accu-Spec, they don't move this kind of equipment commonly. So they have hired a rigger, that is a contractor who's going to come in with a

great big forklift and unload the truck, and then move the piece of equipment into the plant. The rigger is there, they made arrangements for the rigger to be there. They're going to unload it right on to the parking lot, not on to a dock, but on to the parking lot uncrated, and then move the equipment in.

So it arrives. Jim Mullen is there, Ernie Carlson is there. When they open the doors of the tractor-trailer, and it's a box-type trailer, this piece of equipment, this crate is occupying virtually the entire back of the truck, from side to side. There's maybe a little bit of room, those tractor-trailers are usually 90 or maybe 102 inches wide. But it occupies right at the back end a very large portion.

And I think Mr. Mullen and Mr. Carlson will tell you that they saw something in the corner, the back portion of the crate that they could see looked okay, but in the corner they saw something odd, they didn't know what it was, it looked like a mark of some sort. When the forklift goes up and brings this box out, they see what appears to be a puncture hole in the side of the crate. And you'll see a picture of that.

Now, the forklift is bringing this crate down to the ground and they have a chance to look at it. And they go around to the side, that was on the inside of the truck. And they see that the wall of the crate has broken out. That the wall of the crate is cracked, so you can actually see inside the crate. They look at the lower edge on that side, and you

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can see that the wood has broken away. And they look at the bottom of the crate and you can see that that piece of equipment, the legs, the legs are very small, they're more like levelers, the leg is smashed through the bottom of that crate.

Now, they'll tell you if you're just a person observing that damage, it's very obvious this thing was dropped. This 5,200 pound piece of equipment was dropped, what appears to be on the front edge of the crate. Throwing the weight forward and causing this crack in the front panel of the crate. So they get it on the ground.

The truck driver hands Jim Mullen a receipt. And Jim said he signs it, as Ernie Carlson is going back into the plant to get a digital camera, to take pictures of the damage. When Ernie comes back out, the crate, of course, is still there, the truck driver is on his way down the road. And Ernie says oh, my God, you let the truck driver go, we need to get that receipt, mark something on that receipt. No problem, they immediately get on the phone and they call Logistics Plus. Because they haven't had any contact with the trucking company.

They call Logistics Plus and say look, there is a problem, we got damage on this crate, we don't know what the damage might be on the inside, we need somebody out here to inspect it. Later that day, and recollections are a little poor, it might have been within an hour, a representative of Central Transport comes back to Accu-Spec and looks at the

crate. And they actually now unbolt some of the fasteners on the crate and open it up to look inside.

And what they see and you will be able to visualize this better when you see the pictures, there is a shelf where the operator has a keyboard on the front of this device, that shelf has pushed through the crate. That shelf, and we're not talking about something that can't withstand some force, we're talking about a steel shelf on this X-ray machine. That shelf has bent. There's portions on the bottom of the shelf that have bent. It has been subjected to a very substantial force.

At any rate, they're able to look inside and they see that there's a problem, there's damage with the cargo itself. They close it back up. The man from Central Transport authorizes a truck to come back -- we have the rigger there, put the cargo back on a truck, and Central Transport takes the cargo to a warehouse that is owned by Logistics Plus here in Erie County, I can't tell you where the warehouse was. And it sits there.

Now, at the same time, that same day, February 14th, we're getting ahold of Dage, also. We've got the digital photographs, opened the crate a little bit, took some digital photos of the machine itself, and we e-mailed those out to the people in California. And you'll see a series of e-mails.

What Dage said to us was don't turn the machine on. It has radiation, it's an X-ray machine, it's lead lined. From

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the pictures it's very possible that the lead lining has been compromised. If you try to turn it on, you're going to get a lethal blast of radiation. Okay. Actually, Jim Mullen sent back an e-mail that you'll see, that said okay, is it just okay to sit there. They said yeah, it's okay just to sit there, just don't turn it on.

What do we do. They said you need to get an engineer from Dage out of England, out of the United Kingdom, to come over and look at it.

So now we have a piece of equipment that we paid $120,000 for and it's is sitting in a warehouse. We have to wait for a man to come from England, an engineer. He arrives in April of 2003. He looks at it, a guy by the name of Peter Dunn, looks it over and hands us a report. And that report said you need to send this machine back to England to be tested and repaired. You can't turn it on, other than in a controlled environment. And they have to take a Geiger counter, to go over it, the explanation is, to see if there's a leak of radiation. So that's what we do.

We bring another company in, whose bills you will see, to re-crate, re-package the piece of equipment, the X-ray machine, and we send it back to England.

Now, it's August of 2003. They test it, they repair it, and they send it back to us. It's got to go on an ocean freighter. They send it back to us. And it comes back to us,

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I think it's about October of 2003. And it works. And it works today.

So all of the costs that we incurred with regard to this inspection and repair, that's the claim we're making here today. It cost us $47,512.84 to get the inspector here, to have the inspection done, to ship it back to England, to have it repaired. The repair itself was $36,000. To ship it back to the United States, we had to pay almost $800 in customs to get it back into the United States, to get it back to our plant. That's the nature, the type of claim that we are making in this particular case.

Now, how is it that with a claim like this you get into the United States District Court. Sounds like a run of the mill dispute that we might end up in state court. Well, we're in federal court because there's a federal law that applies. There's a federal law, it's just about 100-years-old now, you might hear it referred to as the Carmack Amendment. It's not terribly important to remember that. But there's a federal law that determines the relationship between people in interstate commerce, in interstate transportation. The Carmack Amendment identifies certain people.

A shipper, we're the shipper. Sometimes you might hear us called or see a document saying we're the consignee, same thing. We're a shipper.

There is a freight forwarder. That's Logistics

Plus. They don't handle the freight, they make all the arrangements.

And then there's a motor carrier. And that is Central Transport.

And that law, you will hear, indicates that when you deliver goods to the motor carrier in good condition, and they arrive at their destination in a damaged condition, the freight forwarder has to pay the actual damage. The motor carrier equally has to pay the actual damage. Not twice, but both of them are responsible. If the freight fowarder, Logistics, pays for the loss, they can turn around and find out where the loss occurred, in what part of the trip that the loss occurred. But this law relieves us, the shipper, of that obligation. Because we don't know anything about it.

It also relieves us of having to show that anyone was careless. We don't have to show that someone was negligent, we don't have to show that someone intentionally damaged this. We don't have to show that it was dropped. Although, you will, I believe, find that it obviously was. They're supposed to pay for our loss and then sort it out amongst themselves.

We made a claim to Central Transport and Logistics. We sent a letter to them right after this damage became apparent in February of '03. We said look, here's our situation. We don't know the money amount yet, but here's our

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situation. We got no response. Then we got a response saying well, you didn't fill in our form. So we filled out Central Transport's form. And then they sent us a letter, you'll see this, this is wonderful, they send us a letter that said denied. We got a receipt that says there's no problem. So I don't know what your problem is, it's denied.

So that's the treatment we have had over the last two years, two-and-a-half years. And we're out of pocket $47,000.

We have three witnesses for you. I'm going to have Ernie Carlson testify. He'll tell you what he remembers from these events. Jim Mullen will testify and tell us what he recalls.

Then tomorrow what I hope to have, technology dependent here, we hope to have by video conference, by satellite I guess it is, to have on these screens, a representative from Dage, who is out of California, but is currently in Austin, Texas, on a job. He has told us he will go to a video conferencing facility to be available. We hope to have him testify as well about generally the crating. This crating, he will tell you, this crate that was used to package the equipment and send it to us here in Erie, is the same crate that was used to send the machine from England to California beforehand. It's a special crate, well built.

We have a number of exhibits for you to look at.

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A lot of pictures. Probably a dozen or more pictures. But I hope that we will do this very efficiently. We understand that this is an inconvenience to you. It's been an inconvenience to us as well. But we'll try to do it very efficiently, get the information to you rapidly and hopefully have you out of here soon. We thank you very much for your attention.

THE COURT: Mr. Cohen.

MR. COHEN: Thank you, your Honor. Good afternoon, thank you very much for your service, it's appreciated. We appreciate you spending time here to fulfill this service.

My name is Jeff Cohen, I'm the attorney who represents Central Transport, the trucking company in this case. Sitting with me today is Mr. George Horetsky. He's going to be an important witness who will testify in the trial. He actually is the salesperson who arranged for the transportation with Logistics Plus.

This is one of these transportation cases where there's multiple parties in the chain, so it's easy to get confused with this stuff. So, essentially, it's because there's a middleman. And the middleman is Logistics Plus.

Accu-Spec yes, they are the shipper. They wanted the freight to be moved from California to Pennsylvania. They arranged for this to happen. But as counsel said, they didn't call up Central Transport, the trucking company. They could have, they could have called Yellow Freight, Roadway, but they

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chose to go through a facilitator, Logistics Plus. It's a transportation logistics company. That's what they do, they have a 100 trucking companies, they broker, they pick the trucking company that has the best rates or best whatever for their customer.

So Accu-Spec calls up this transportation broker or freight fowarder, these terms will come at you, it's the middleman. And they in turn pick up the phone and call the truck, Central Transport.

Now, the problem comes here in what happened when Logistics Plus got the information from Accu-Spec, and then conveyed the information to Central Transport. Really, what it boils down to, I've been thinking about it, what it boils down to, is this case is really about broken trust, that's what it's about. It's about broken trust. There are these agreements which take place in the transportation industry. And one vendor trusts the other.

In this case Accu-Spec, the company that wanted the big old machine moved, they trusted Logistics Plus to do a particular function, to do a job. Their job, although it sounds pretty simple, you have to do it right. They wanted Logistics Plus, call me a truck and get me a good rate, pretty much. Protect my interests effectively, make sure you get me a good truck, that's going to get it there, it will be there when

I want it. So Accu-Spec trusts Logistics to do that.

Central Transport, the trucking company, also trusts Logistics Plus. Central Transport trusts Logistics Plus to give them information about the freight that was accurate. Okay. Because Central Transport, they're not a volunteer company, they work for profit, like all these companies. So to ship the freight properly and to enter into an agreement which is truthful, they needed truthful information and accurate information.

Logistics Plus failed on both accounts. They breached their trust to Accu-Spec, they breached their trust to Central Transport. How did they do this. Why am I pointing the finger at Logistics Plus like this. It's because of one central factor with respect to how the information that was conveyed.

With the court's permission, I'm going to put one of the pre-approved exhibits up on the monitor for the jury. Okay. This document that you're looking at right now is called a bill of lading. This transportation doesn't happen in a vacuum. There are agreements. You would imagine there would be agreements, these companies aren't going to do business on a handshake.

So what happened in this case is that Logistics Plus, the freight fowarder, they put together a document called the bill of lading. You're looking at the bill of lading. You'll hear bill of lading a lot, it's really a contract. On

the bill of lading there's a description, right where that arrow is -- for classification. Okay. So as you can see on the bill of lading, this X-ray machine thing was described only as a crate --

THE COURT: Excuse me, see if you can zoom in on that, focus that -- Mike, maybe you can help him.

MR. COHEN: Thank you, your Honor. In this document you can see on the left -- and this document was filled out by Logistics Plus. They only described the property as a crate. They didn't say X-ray machine. They didn't say $135,000 sophisticated X-ray machine. They called it a crate.

And what they also did, which was very important, is over here on this side there's something called class/rate. And they put a 50 in there. Why is that so important. That's important because that's the number that the trucking company uses to determine how much to charge them. There will be substantial testimony about how that all works.

So really what happened here is the logistics company, Logistics Plus, provided information to Central Transport which was incorrect. Now, that Class 50 is wrong.

There are people in this case. They're going to get up and testify on that stand. You are going to have to judge their credibility. Ultimately, that's many of these cases come down to that. You're going to have to believe one person over another person. Sorry to put you in that position, but that's

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what your job is.

We're going to have testimony, probably tomorrow, of George Horetsky, who's sitting right there. He's going to sit up there and he's going to testify about what communications he had with Logistics Plus when making arrangements to transport the freight. Mr. Horetsky is going to testify that originally he gave a price quote to Chris Fanzini, he's the dispatcher from Logistics Plus. He originally gave him a quote to move the freight. The dollar amount was determined to be too high and the Logistics Plus representative, Chris Fanzini, said can you get me a better rate. Remember, Chris Fanzini is moving the freight for his father-in-law, let's understand the relationship here. There's incentives and biases, you'll have to generate and use to determine credibility.

So George Horetsky is going to testify that subsequent to that, after Mr. Fanzini says can you get me a better rate, George says well, what's the class. That's the question in the transportation industry, what's the class. Mr. Fanzini told George it's Class 50. Class 50 is the lowest classification. Classifications are numbers which are assigned to freight, everything from evergreens to apples. To cement, to tile, to nuts and bolts, has a number, in this book, it's this thick, (indicating). All the trucking companies and all the transportation companies use it.

Class 50 is cement. It's tile. It's dense, heavy things that are of low value. This was a sophisticated X-ray machine, Mr. Fanzini said Class 50. That was wrong.

So George has to call somebody to get a rate. He's the sales guy, he has to call somebody else to get the rate. He needs the class. So he calls to headquarters, he says hey, I got a piece, he didn't know it was a machine, he knew it was a crate. I have a crate, it's this big, it's going from here to there and it's Class 50. They give him a rate, it's communicated to Logistics Plus. And, of course, Logistics is the middleman, so then it goes to Accu-Spec.

That's what the rate was based on, it was based on Class 50. When in truth, and I will show you documents and there will be testimony it should have been classed at 100. The difference of freight rate isn't that much, however, it makes the contract a lie, really. You can't go into an agreement and give false information and then turn around and say pay me full value for my damage. It doesn't work that way.

So while counsel for the plaintiff is correct in asserting that there is this law out there that says that a shipper is entitled to seek recovery from freight forwarders and carriers, there's also another law out there that says you can't lie to the people or misrepresent to people and expect to get full coverage.

So this will be for you to decide. Two people will sit there and there going to say different things. Mr. Fanzini

is going to say that George Horetsky said -- he said, Chris, let's just make it Class 50. That's different than what George is going to say. You're going to have to look at these people and figure out who is credible. We're confident that you'll determine that Mr. Horetsky is telling the truth when you look at the complete picture here.

So that's one issue in this case. There's another thing that Logistics Plus did wrong. And this deals again with the paperwork, moving of the freight. This document you're looking at here, this bill of lading, this contract, has in the top part and the printing is not very clear on this version, we can get it clearer, it basically says -- you can see right over here, the shipper certifies that he is familiar with all the terms and classifications on the bill of lading -- I can't even read it myself, subject to the classification and tariffs in effect at the time the shipment is made. Very unclear version, not a good example. But this bill of lading that was prepared by Logistics Plus, incorporated what's called a tariff.

Central Transport has a book. This cargo doesn't move in a vacuum. As you can imagine, these trucking companies, they have documents in which they try to protect themselves. They try to lower the liability as low as possible so they can give the buying public the lowest rates possible, just like any company. They have to manage their risk.

In this case there was a limitation of liability for

this type of freight. The problem is nobody told Central Transport what type of freight it was. And that is used machinery. There's going to be, there's another interesting thing that you're going to have to do. There's a little bit of semantics game, a game dealing with this language here about what is used.

You've heard testimony that the X-ray machine was a demo model. Okay. Many hours have been spent evaluating what a demo model is. Is it used, is it new. Well, there's going to be testimony, coming right from that stand, maybe from the video, probably from the video from the gentleman in Texas, as to what this machine was. How long was it on the demo floor in California, that's where it came from. How many X-rays did it take. How many hours was it operating. How much of a discount did Accu-Spec get for this thing. I mean, if you get a discount, we're going to argue it's not new. If it's going to take a 100 X-rays, a 1,000 X-rays, we don't think it's new. It will be for you to determine what's new, what's used.

And the reason that becomes important, ladies and gentlemen, is because in the trucking companies, this is in Central Transport's rules, it says if you're moving used equipment, you're limiting your liability to 10 cents per pound. That's low. That is something Logistics Plus, as the sophisticated international logistics company, should have known, because they should have looked at it, number one.

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Number two, if they're doing their job, not breaching trust, they should have told Accu-Spec about it. So they knew. Well, do we really want to ship this $135,000 machine for 10 cents per pound liability. The answer I'm sure would have been no, I don't want to do that. Charge me a higher rate. I want to protect it.

So there are these two factors. There is a breach of trust in misclassifying freight, Logisitics Plus did, which leaves the burden then on them for the damages to the machine, not Central Transport. We would have never entered into the agreement if we had known we had been lied to.

And the other thing is there is a limitation of liability in the papers, in the agreement. Logistics Plus wrote that, wrote that document. Logistics Plus drafted this bill of lading. The same bill of lading that says that the carrier's tariff is subject to the carrier's tariff, we didn't write it, they wrote it. You're supposed to read what you wrote, you're supposed to know what you write. So they should have known when they wrote that, that they were binding the shipper to this limitation of liability. This is an international company with hundreds of employees. This is not a mom and pop shop. So they should have known what they were doing. So that's number two.

The last thing with respect to this freight damage, it gets into more of the physical, we're moving away from the paper trail, it gets into the physical. Accu-Spec does have to establish that Central Transport got the freight in good condition, just as counsel testified, and that it came out the other end in bad condition, and their damages. To get money from anybody, whether it be Central Transport or Logistics Plus. I told you why Central Transport will not be found liable for dollars here, why we believe.

But with respect to Logistics Plus or Central Transport, there's going to be no one testifying, the forklift driver who put it in the back of the trailer in California is not coming to testify. The forklift driver who pulled it off the trailer in Erie is not testifying. The person who packaged the crate, I believe that is the person we have on Tuesday didn't pack the crate, I think he only saw the machine three or four days before it went into the crate. What happened, what happened the next couple of days. What happened when the forklift driver put it into the back of the truck.

So there will be testimony about this, they're going to have to meet their burden with respect to that. If they do, if you're convinced it went into the truck in good condition, the one in California, it was switched once, I don't know about more than once, different trailers, the truck drivers didn't come all the way across the country, and it came out of that other trailer in bad condition and they proved their damages, okay, they jumped over a couple hurdles, now it's time to face

the other issues I've discussed. The misrepresentation, either careless or intentional, doesn't have to be intentional, it could just be careless, with regards to that classification. Now, there's a limitation of liability. Testifying on behalf of Central Transport will be, of course, George Horetsky. He's a very important witness because of the central nature of this classification.

And there's a person by the name of Jeff Cackowski. He's going to come in to testify about how all these papers work together. It's not simple to a lay person how they work. You got one document incorporating another document, okay. So he's going to explain how that all works. How the contract works really.

And the third person to testify, we actually have the truck driver, who dropped off the freight here in Pennsylvania. His name is Dale Meabon. He'll testify about -- well, about what he saw, what he did. He's going to testify that he saw the freight come off the trailer here and that there was, the crate was dinged. He's going to testify to that. He's also going to testify that it looked like the freight shifted within the box. I don't know about all this snug as a bug kind of testimony. There is this thing in a box, it moved. It's two tons. You got to pack something that is two tons pretty darn good to make sure it doesn't move. You're putting it on the back of a truck. It's driving around this

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country. If you just brace it on the bottom, it might not work out. I think that is how this one was braced, inside the box with bracing. You could brace it around the top, you could brace it around the bottom. My understanding is that it was braced only around the bottom.

There's also a little device on these boxes called tip and tell. Cute little name for a thing you put on a box, a crate, and if it tips, it makes like a mark in ink, like mercury, whatever, sticks. So you can tell, look here, this thing was flipped over, you can tell the ink is up here. This tip and tell was not activated. So it's possible that this freight shifted within the box because it wasn't packaged properly and that the crate actually wasn't tilted or tipped, that's speculation. You're going to have to determine this from listening to these witnesses. So there's all these issues you're going to have to think about, you got a lot to do, I want to let you get to it. We'll try to be as efficient as possible and as quick as possible. Thank you very much for your time.

THE COURT: Members of the jury, before we hear from Mr. Knox, you've been here quite some time now since you came back from lunch, we're going to take a short recess -- and we'll resume in about five minutes.

(Recess from 2:40 p.m.; until 2:52 p.m.)

THE COURT: All right, Mr. Knox.

MR. KNOX: Thank you, judge, may it please the court. Ladies and gentlemen of the jury, good afternoon. My name is John Knox and I represent Logistics Plus. We are a logistics company, as has been pointed out. What that means is we're in the shipping business, we're in the trucking business. However, we don't have any trucks.

What we do and what we did in this particular instance is that we're contacted by a customer like Accu-Spec to get a good price. It's been alluded to that people like Accu-Spec will contact trucking companies directly. If they choose not to, they choose to go with us because we have a number of contacts in the trucking industry. We call some people, we get a good price, customers are pleased.

We're a local company, we're a growing company. We were founded by a gentleman by the name of Jim Berlin, who is here today, along with an officer of the corporation, Mr. Mike Reilly.

Mr. Berlin is a guy with an interesting background, with broad experience in the shipping industry. He's worked as a truck driver. He's worked as a forklift driver, before staking his claim and creating this company, which is now located here in Erie.

In this case you're going to hear testimony and evidence from a number of people. But first you're going to hear about a gentleman by the name of Jim Mullen. Now, Mr.

Mullen, as the lawyers indicated, he is the gentleman who has dealt with Logistics Plus on a number of occasions in the past. Incidentally, he also happens to have a son-in-law who works for Logistics Plus. And you're going to hear evidence and testimony that he initially contacts Mr. Fanzini, a person at Logistics Plus, and says to him, hey, I've got a crate, it's in California, I need to get you guys to ship it for me, can you get me a good rate. That's the extent of the transaction.

Mr. Fanzini says let me see what I can do. He then surveys a number of the carriers out there in the United States and he comes across Central Transport, one of the defendants in this case, located in Michigan. He talks with, Mr. Fanzini that is, talks with a gentleman by the name of George Horetsky at Central Transport. He says hey, I got a guy back in McKean who wants to ship a crate from California to McKean, can you get us a quote. It weighs 5,280 pounds, what can you do.

There's an initial quote given, they kind of go back and forth. That information is relayed back to Accu-Spec. Accu-Spec says can you do a better deal, can you get us a better quote. Mr. Fanzini, per that direction from Accu-Spec, goes back to Central Transport, talks to Mr. Horetsky.

Mr. Horetsky then suggests, tell you what, why don't we do this, why don't we ship it at Class 50. Great, I think I can sell that. Goes back to Accu-Spec. Accu-Spec is pleased, let's do that. We'll ship it at Class 50, one crate from

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California, 590 bucks. That's it.

At that point Logistics Plus, this is one of the key points of this case, Logistics Plus takes that information, whose source is only from Accu-Spec, one crate, 5,280 pounds, Class 50. And they put it on that document that Mr. Cohen showed you, a bill of lading. It is essentially the contract.

Where did we get that information. Where does a company like Logistics Plus, that doesn't own trucks, that doesn't touch the freight, doesn't smell the freight, doesn't handle the freight, where do we get the information on particular shipments. We get it from our customer, we get it from Accu-Spec. That's all they told us. Nothing about an X-ray machine. Nothing about a fragile X-ray machine, nothing about an X-ray machine that cost more than my first house, $120,000. That is not mentioned. That's important.

Now, after the bill of lading is drawn up, Central Transport then takes its truck, goes out to California and picks up the crate. The crate is loaded onto Central Transport's truck, they drive all the way back to Pennsylvania.

We don't know really what happened at that point. Again, Logistics Plus isn't handling the freight, we're not touching the freight, we're not doing anything with the freight. Central Transport, the trucking company, the carrier, is carrying the freight across country. What happens during that period of time, I don't know. That is one of the issues,

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obviously, that we need to sort out. What I do know is we weren't there.

At that point the freight eventually arrives in McKean. They open it up, they see, number one, the crate is damaged, then they open it up and see what's inside is also damaged. And what's inside, surprise, surprise, is this large, expensive industrial X-ray machine that is worth $120,000.

Well, everybody agrees that the machine is damaged. I don't think anybody disagrees with that. What is the issue, though, is what caused that damage.

Now, you're going to hear a lot of evidence and testimony. And that's really going to be your chief decision here, what caused this damage, among other issues. Was it some type of act on the part of the shipper, Dage, out in California when they packed it. Was it some part of what Accu-Spec failed to tell us about what this was. They told us it was a crate, 5,280 pounds, that's it. Does their failure cause this whole problem, to tell us exactly what we're shipping.

You're going to hear testimony from Mr. Berlin, again, the CEO, who will say well, if they told us that it was an X-ray machine that was worth $120,000, I don't think we would have had it shipped at the cut rate, Class 50 rate. We probably would have put it in some type of other truck, some type of dedicated truck, bubble wrap that thing, make sure it was as snug as a bug. That it's the only crate going. That was not done here. Why, because Accu-Spec did not give us any information, other than one crate.

Now, according to paragraph 12 of the plaintiff's complaint, and this is the document that starts the lawsuit that brings us all together here, they allege -- let's put this up for you to look at. In paragraph 12 the plaintiff, Accu-Spec, alleges "after a reasonable investigation, Accu-Spec believes that Logistics Plus should have identified the X-ray machine as Class 100 cargo, meaning cargo which was fragile and needed to be transported with a higher degree of care than metal castings require." That's what they allege. Two problems, though.

Number one, again, they never told us that it was an X-ray machine, let alone a fragile X-ray machine, let alone an expensive X-ray machine, how would we know whether to class it one way or the other. We class it as a crate, that's what they told us.

Number two, the second problem is, you're going to hear nothing from any of the witnesses here that will testify that this Class 50, Class 100 designation, plays any role whatsoever in the duty of care, in terms of how somebody handles it. Mr. Cohen alluded to the fact that well, we could have had a better deal, maybe they save a few hundred bucks when they ship at Class 100 versus Class 50. That's irrelevant, we're talking about damaged freight here. Does

that misclassification, if it was a misclassification, does that play any role. Nobody is going to testify to that fact.

Now, Accu-Spec would have you believe that what they've got to do here is come in and prove their case and that proving their case is relatively simple. Accu-Spec's counsel, Mr. Delaney has indicated, correctly so, that what they have to prove is that the shipment, essentially, the freight was in good condition at the point when it was going on to the truck for Central Transport. Thereafter, it shows up at Accu-Spec damaged and that they suffered damage, that's what they have to prove. That's their part in this. I don't know if they can do that, but if they do, that's not the end of the story. At that point in the law we call that, that's at the point when the burden shifts, the burden then shifts to Mr. Cohen, to myself, Central Transport, to Logisitics Plus, to prove that we weren't negligent.

I feel confident that the evidence will show that we weren't negligent. Again, we don't touch this. We don't handle the freight. The only thing that they're talking about in terms of our negligence is we misclassified something. When again, we don't know what it was, we're told it's a crate.

Beyond that, we also have to talk about an act of the shipper. The shipper in this case again is Accu-Spec. Mr. Cohen talked about this is a case about trust. I agree. It really is a case about trust. Because we have to trust the

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information from our customers. We don't see this freight. They tell us what it is. We don't question it. We say okay, this is your rate. Accu-Spec failed in that respect. The shipper failed to give us the information about what it is, about how much it is, about the fact that it's fragile, nothing.

Ladies and gentlemen, I want to thank you in advance for your gracious service here. I know this has probably not been too exciting up until this moment in the case. We greatly appreciate your time and service here. Some of you may think that from watching television that Mr. Delaney, Mr. Cohen and I spend every day in trial, we're constantly having all these cases. And that's simply not the case. These are rare. These are rare to go to trial. There are some statistics out there that say that most claims settle 95 percent. This one didn't. And it didn't because there are some very real and honest disagreements on the facts and the law. It's obviously your job to sort those out. So we're going to need you.

Lastly, I don't think this really is a case about, just from our perspective, a crate. It's not about $47,000 and change. This is a very, very important case for us. This case speaks to the very nature of how our growing company can continue to do business. Again, how can we do business if we cannot trust the information given to us by our customers, Accu-Spec. One crate, 5,280 pounds, Class 50. That's all we

know.

If we can't trust our customers, the logical alternative is for us to somehow now verify what they're telling us. Again, we don't touch, we don't see, we don't handle the freight. How are we going to verify the freight. How are we going to verify the freight in this case out in Fremont, California. We're back here in Erie. The answer is we can't, it's impossible. We're shipping stuff all day long, thousands of shipments a year. Don't let this case hold us liable because that goes against the way we do business, how we do business.

Now, Central Transport lastly is going to argue that we somehow perpetrated fraud upon them. That's pretty funny. They're in the business, they're trying to paint us as this super expert, we're even smarter than them. Come on, they are the big Kahuna here. They've been in the trucking industry longer than anybody in this case.

They get our bill of lading, Class 50, one crate, 5,280 pounds. And then they find out after the fact that it's an X-ray machine, hold on, there's fraud here. Think about that. You're going to hear testimony from witnesses that are going to talk about the fact that Mr. Horetsky gets this bill of lading, gets this information. If he thinks it's so important to know something more than just that it's a crate, why doesn't he ask us. He doesn't. Why doesn't the truck

driver in California ask us. Well, is this thing I'm picking up, is it a crate with an X-ray machine or is it a box of bowling balls. Nobody says that here. Keep those points in mind. Thank you for your time.

THE COURT: Mr. Delaney, call your first witness.

MR. DELANEY: Your Honor, we would call to the stand Ernie Carlson, please.

THE COURT: All right, Mr. Carlson, come on up, stand in front of the clerk, my deputy clerk will swear you in.

THE CLERK: Raise your right hand.

ERNEST CARLSON, PLAINTIFF WITNESS, SWORN

DIRECT EXAMINATION

BY MR. DELANEY:

Q. Mr. Carlson, could you tell us your full name and your business address and your occupation?

A. Ernest D. Carlson, business address is Accu-Spec Electronic Services, 8835 Walmer Drive, McKean, PA. I'm president and partner in the business.

Q. How long have you been with Accu-Spec?

A. Since --

THE COURT: Mr. Carlson, sorry to interrupt you, see that microphone in front of you, you're not making very good use of it.

THE WITNESS: Okay.

THE COURT: Wait until I finish talking, too, the

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court reporter has to get down everything that you say. Go ahead.

THE WITNESS: Okay, since the inception in 1989.

BY MR. DELANEY:

Q. Are you one of the owners of Accu-Spec?

A. Yes, myself and two partners.

Q. Do you hold a position, such as an officer of Accu-Spec?

A. Yes.

Q. What position is that?

A. The president.

Q. How long have you been president?

A. For five years.

Q. Tell us a little bit about Accu-Spec; first of all, where
is it located?

A. McKean, Pennsylvania.

Q. Does it have any facilities outside of McKean?

A. No.

Q. How many employees today?

A. We've got about 188 employees.

Q. And what is the business of Accu-Spec?

A. We're a contract manufacturer. We basically build
printed circuit boards and cable assemblies for our customers.
We provide the expertise and equipment, to provide them with a
quality component.

Q. What types of customers, what kind of industries use the

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products that you build for them?

A. Transportation, medical, which has really come along, the
industrial controls as well.

Q. Take us back to 2003, beginning of 2003, how many
employees at that point in time?

A. Approximately, 100.

Q. Same business?

A. Yes.

Q. Same location?

A. Yes.

Q. Now, were you involved in 2002 on behalf of Accu-Spec in making a decision to acquire an industrial X-ray machine?

A. Yes.

Q. And tell us what was the purpose for this new equipment that you wanted to buy?

A. It was going to enable us to provide another technology level to our customer base. And, basically, to inspect and process controls and BGA components in our industry.

Q. Okay. Prior to this decision being made, did Accu-Spec have an X-ray machine?

A. No, we did not.

Q. What did you do to try to find one?

A. Myself and my operations manager, we made a trip to Chicago in 2002. And there's a technology show, generally in September, October, that they have every year, where different manufacturers come in and demonstrate different equipment. Might be an X-ray machine or it might be a pick and place machine, it's truly a large show. We went up there and looked at several different X-ray machines.

Q. Did you decide on one at that show?

A. We pretty much did. We looked at, like I said, several other ones. And the Dage unit was just head and shoulders above everybody else, just by the technology that they offered.

Q. Did they have people, Dage, did they have people at the show you could talk to about their machines?

A. Yes.

Q. Did you cut a deal right then and there?

A. No, we did not, we wanted to think about it.

Q. Do you know where Dage is headquartered?

A. Their U.S. headquarters are out in California.

Q. Do you know where they build the machines?

A. In the UK.

Q. And when did you finally make a deal?

A. It was late December of that year.

Q. Do you remember what the initial quote was for an X-ray machine from Dage?

A. Yes, $135,000.

Q. Did you accept that price or did you negotiate?

A. We negotiated and made a deal at $120,000.

Q. Okay. Did you have conversations with Dage about where

the machine would come from that you would receive, where it was currently located?

A. It was at their facility in California.

Q. Did the people from Dage tell you what kind of use or what kind of -- why it was in California, as opposed to the UK?

A. It was to demonstrate the capabilities of the machine to potential customers.

Q. So this was a demo?

A. Yes.

Q. And, I'm sorry, I may have asked you this, what was the price you ultimately agreed upon?

A. $120,000.

Q. Do you know when you reached that agreement?

A. Late December of 2002.

Q. All right. Let me show you a document that we've marked

previously as Plaintiff's Exhibit No. 1, and I'll just ask you
if you recognize that document?
A. Yes.
Q. And what is that document?
A. It's an invoice from Dage.
Q. And what is it for?
A. The X-ray machine.
Q. The one that you purchased?
A. Yes.
Q. And what's the total amount to be paid?

A. $120,000.
Q. Ultimately, did Accu-Spec pay that amount of money for
the machine to Dage?
A. Yes, we did.
Q. Thank you. Now, I want to show you some photographs, Mr.
Carlson. Can you see that, Mr. Carlson?
A. Yes.
Q. What is this Plaintiff's Exhibit 2, what does this
depict?

A. This depicts the machine as it is today in our facility. It's the machine on the right-hand side that says Dage.

Q. Is this your facility in McKean?

A. Yes.

Q. When were these pictures taken?

A. Just this past week.

Q. Okay. And let me just see if I can move in a bit. Is this area of the picture with the gentleman with his back to the camera, is that the area of the picture that shows the machine that you purchased?

A. Yes, it is.

Q. I'm going to show you now what we previously marked as Plaintiff's Exhibit No. 3 -- and ask you if you could tell us what that depicts?

A. That's a closer shot of the Dage X-ray machine.

Q. Who is that gentleman standing next to it?

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A. He's one of our quality supervisors by the name of Rob Freitas.

Q. Could you tell us, if you know, what the dimensions of

this piece of equipment is?
A. It's approximately a six-foot cube.
Q. All right. Now, at the front of the -- if I could find a pen here, on this picture there appears to be something like a computer screen right here, what is that?
A. That's the actual screen where the operator can view the actual X-ray.
Q. And what is this opening located next to the screen?
A. That's where they place the sample.
Q. Is it a closed compartment into which they place a sample?
A. The door there you can see the chrome handle, there's an interlock on it, you open it, place the sample in and close the door then.
Q. All right. This area about waist high or perhaps lower than waist high, it appears there's a keyboard on that area, is that right?
A. Yes.
Q. Is that a shelf that's detachable or is it something that is built right on to the X-ray equipment?
A. It's permanently attached to the machine.

Q. Okay. Let's take a look at another photograph,

Exhibit No. 4, there's that same young gentleman; and what does this depict?
A. The machine from a different angle, so you can get an idea of the depth.
THE COURT: Sir, your voice is trailing off.
THE WITNESS: Sorry.
THE COURT: That's okay, just keep it up. Go ahead.
BY MR. DELANEY:
Q. This is the shelf that we referred to before?
A. Yes.
Q. The screen in the window?
A. Yes.
Q. Is this thing on casters, by the way, or is it on legs?
A. It's on casters right now.
Q. When it arrived, do you remember if it was on casters or legs at that point?
A. I believe it was on casters.
Q. All right. Let me show you what's been marked as

Exhibit 5, what is Exhibit 5 depicting?
A. That's the inside of the machine, that's a rear view,
there's two large door that open up for service and so forth.
Q. Are there any movable parts in this piece of equipment,
Mr. Carlson?
A. Yes, there are.
Q. What are they?

A. There's a table and a camera, the best that I can
recollect, that do move within the machine.
Q. If we were to look at the front of the machine, are those
on the interior or the exterior of the body of the machine?
A. They're on the interior of the machine.
Q. All right. I'm going to show you another picture that
we've marked as Exhibit 6, I'll zoom out a bit here -- what
does this depict?
A. It's another view of the inside of the machine.
Q. The same as the last photograph we had?
A. Just a different angle.
Q. But from the rear?

A. Yes.

Q. Okay. Exhibit 7, what does this picture depict?

A. The operator's actually evaluating a printout circuit board that is displayed on the screen.

Q. And, finally, let me see if I can bring this in a bit, Exhibit 7 -- I'm sorry, this is Exhibit 8, what does this depict?

A. That is actually the BGA component that we spoke about earlier. Each one of the dots within that square have a solder joint that is in between the component and printed circuit board, which cannot be examined by any other means other than an X-ray.

Q. Thus the purpose for this piece of equipment?

A. Yes.

MR. DELANEY: Your Honor, I would at this point move for the admission of Exhibits 1 through 8.

THE COURT: Any objection?

MR. COHEN: No, your Honor.

MR. KNOX: No, your Honor.

THE COURT: They're admitted.

BY MR. DELANEY:

Q. Do you know the size and weight of this piece of equipment?

A. Yes, it's 5,200 pounds, approximately, and a six-foot cube.

Q. All right. When you reached an agreement with Dage, what was the arrangement for getting the equipment from California to Pennsylvania?

A. We were to select our own carrier and pay for that carrier as well.

Q. What did you do, did you have any direct involvement in that transportation issue?

A. No, we had a project manager, Jim Mullen, who I had asked to make arrangements for the transportation of the machine to McKean.

Q. Is this the kind of shipping that Accu-Spec does on any frequent basis, shipping machines of this sort?

A. No, it's not. Typically, a shipment for us or even our receiving is probably less than a 20-pound box.

Q. Did you have any further involvement with Mr. Mullen in setting up the shipment of this particular piece of equipment?

A. Not in the actual shipment, but in the receipt thereof.

Q. In what way?

A. We wanted to make arrangements to have a rigger on hand to load the machine off the truck and bring it into our building. Even though we do have a forklift that was probably capable of handling the equipment, we weren't comfortable in doing it ourselves and we hired professionals to do this.

Q. Did you know that Mr. Mullen was going to contact Logistics Plus to try to arrange this shipment?

A. Yes.

Q. Had you dealt with Logistics Plus prior to this transaction?

A. I know that we have, but personally, no.

Q. Did you give any instructions to Mr. Mullen that he should find the cheapest rate possible to get the equipment to Pennsylvania?

A. No.

MR. KNOX: Excuse me, your Honor, sorry to interrupt, may we approach.

THE COURT: All right.

(At side bar on the record.)

THE COURT: Go ahead.

MR. KNOX: I'm wondering if it is appropriate to perhaps sequester Mr. Mullen, if in fact that is Mr. Mullen.

THE COURT: Who's that in the back of the courtroom?

MR. DELANEY: Mr. Mullen.

THE COURT: Is he going to testify?

MR. DELANEY: He is. He's already heard half the testimony.

THE COURT: I'll sequester him. So I don't have to tell him to leave in front of the jury, go back and tell him.

(End of discussion at side bar.)

BY MR. DELANEY:

Q. Did you provide Mr. Mullen or give any instruction to Mr. Mullen about getting the cheapest possible rate for transportation of this piece of equipment?

A. No.

Q. Was price an issue for you in the transportation of this piece of equipment?

A. No.

Q. Now, were you present when the equipment arrived at Accu-Spec's facility?

A. Yes.

Q. Do you remember the date?

A. February 14th.

Q. Of 2003?

A. Yes.

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Q. Prior to that date, were you aware that Central Transport was even involved in the shipment?

A. No.

Q. To your knowledge, was there any documentation that was given to Accu-Spec by Logistics about the shipment?

A. No.

Q. This piece of equipment, did you have a loading dock onto which the equipment could be placed from the truck; how was it going to be unloaded?

A. We were going to have Rog's Riggers unload the equipment from the trailer on to the parking lot. There's an overhead door in close proximity to where the machine was going to be located within our facility.

Q. So you were going to put it right on the ground?

A. Yes.

Q. Is it a box trailer or a flatbed that shows up?

A. It's a box trailer.

Q. Is there anyone else present with you when the truck arrives?

A. Jim Mullen and the gentleman from Rog's.

Q. When you come out, Mr. Carlson, are the doors to the truck opened or you there when they open them, what do you recall about that?

A. I can't recall exactly when the doors were opened, but I did see the container on the bed of the trailer.

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Q. How large is the container relative to the back of that trailer?

A. It was centered on the rear of the trailer in the back, and took up a very large portion of the trailer.

Q. On that backside -- and I guess we need to establish this, can you see the equipment or is it in a crate?

A. It's in a crate.

Q. On the backside of that crate that's visible to you as you stand on the ground, did you see anything that would cause any concern?

A. No.

Q. See any damage to the crate?

A. We saw something that was questionable on the side.

Q. Not on the back panel?

A. Not on the back panel.

Q. Now, when you say you saw something that was questionable, what do you mean?

A. There appeared to be a mark or something up high on the crate. And we couldn't really see what it was because it was in the space of the restraints.

Q. I'm going to show you a picture that is marked Plaintiff's Exhibit No. 9, and ask you if that picture is familiar to you?

A. Yes, it is.

Q. Do you know about when it was taken?

A. That day.
Q. Okay. What does that picture depict?
A. The mark that we saw on the side of the crate.
Q. Is this the crate that contained the X-ray machine?
A. Yes, it is.
Q. If you could, first of all, let me point out, is this the mark you're referring to?
A. Yes, it is.
Q. And when you first saw it on the truck, could you tell what that mark was?
A. No.

THE COURT: Mr. Delaney, I'm sorry to interrupt, but for purposes of the record, that will be inadequate to establish what you're talking about, unless there is some further description.

BY MR. DELANEY:
Q. What the judge means, Mr. Carlson, is I didn't describe what we were talking about. On this Exhibit 9, do you see the corner of the crate that is oh, a little bit to the right-hand

side of the total picture?

A. Yes.

Q. And do we see the sky above the top of the crate?

A. Yes, we do.

Q. Do you see that there appears to be the head of a metal bolt at the edge of the crate near its top?

A. Yes.

Q. And the mark that you and I have been talking about, is that a mark that's just to the left of that bolt?

A. Yes, it is.

Q. I forgot where I was. When it was in the truck, could you tell what that mark was?

A. No, we could not.

Q. Did the rigger then bring the forklift and move the crate off the truck?

A. Yes.

Q. In doing that did you see any damage caused by the rigger?

A. No.

Q. When he gets the crate on to the ground, can you see that same mark that we just looked at on Exhibit 9?
A. Yes.
Q. And can you tell what it is once you see it on the ground?
A. Yes.
Q. What is it?
A. It's a puncture to the crate.
Q. Okay. That's near the top of the crate, is it not?
A. Yes.
Q. All right. Once you get this crate on the ground, do you look at the crate for purposes of trying to inspect for other

damage?
A. Yes.
Q. And do you find anything?
A. Yes.
Q. Now, tell us, first of all, where you would have found damage?
A. We found damage on the side that was furthermost into the

trailer. That was where the shelf had pushed the container outward and caused a bulge in fracturing of the container.

Q. Am I correct, if we take the side that you can see when the tractor-trailer doors are open as the backside, am I right?

A. Right.

Q. Where on the crate is the damage?

A. The front side.

Q. All right. I'm going to show you what we marked as Plaintiff's Exhibit No. 10, and is that a photograph that is familiar to you?

A. Yes, it is.

Q. When was that photograph taken?

A. That same day.

Q. On the 14th of February?

A. Yes.

Q. And did you take this photograph?

A. I don't think so.

Q. Do you know who took it?

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A. Probably -- I could probably narrow it down to one or two people.

Q. Somebody from Accu-Spec?

A. Yes.

Q. This particular photograph, what is it depicting?

A. The damage to the crate.

Q. On what we have described as what side?

A. The front side.

Q. Now, let's just describe it for the written record. Is this particular photograph showing a portion of what is described as the front side of the crate?

A. Yes, it is.

Q. The crate is sitting on the ground, I presume, at this point?

A. Yes, it is.

Q. And the top of the picture does not depict the top of the crate, does it?

A. No, it does not.

Q. But let me compare the two pictures so just we get our bearings here. I want to take you back, having looked at this damage, take you back and show you Exhibit 4, that is the equipment today. Would the crack in the wall of the crate be consistent with this front, that is where the computer screen

is on the equipment?
A. Yes, it is.

Q. Does the crack correspond with a particular portion of the X-ray machine?
A. Yes, it does.
Q. And where does it correspond?
A. The edge right near the keyboard.
Q. That would be the edge on Exhibit No. 4, the edge of the shelf near the keyboard?
A. Yes.
Q. So let me put Exhibit 10 back on. We look again at the photograph that is Exhibit 10, could you see inside the crate through that crack?
A. Yes.
Q. All right. Now, did you notice any other portions of that front panel -- let me withdraw that. The crack is this, am I correct, the crack is this very dark jagged sort of impression towards the left-hand side of that panel?
A. Yes.

Q. Is the strut or that -- that may be a four-by-four actually, brace on the face of that portion of the panel, is it also broken?
A. Yes.
Q. Is this crack demonstrating where that is broken?
A. Yes.
Q. I'm not sure this image is very good on the screen, is that whole panel bulging out?

A. Yes.
Q. Let me take this away. I'm going to show you Plaintiff's Exhibit No. 11, and ask you if this is a photograph with which you're familiar?
A. Yes, it is.
Q. What does that photograph depict?
A. The side of the crate on that date with some damage to the bottom side.
Q. I should ask you what date was this picture taken?
A. 2/14/2003.
Q. Does this picture depict the side of the crate where we

saw the crack or the bulging?

A. No, it does not.

Q. What side of the crate is this?

A. This would be the same side that had the puncture up high.

Q. Okay. And what are we looking at here, what are you seeing in terms of any damage to the crate here?

A. There was a wooden strip that ran along the bottom edge of the crate, approximately half of that was missing, as well as damage to the plywood.

Q. And, again, this is depicting the crate on the ground?

A. Yes.

Q. What is this blade that seems to be running parallel with the edge of the crate?

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A. That's a fork from the forklift that the riggers had brought on site.

Q. Let me show you what is now Exhibit 12, can you see that, Mr. Carlson?

A. Yes, I can.

Q. What is this depicting -- first of all, do you know the date on which this photograph was taken?
A. 2/14/2003.
Q. And do you know where it was taken?
A. At Accu-Spec.
Q. Do you know what it depicts?
A. Yes.
Q. Tell us?
A. That's the bottom of the skid.
Q. Okay. And this is the same crate in which the X-ray equipment is located?
A. Yes.
Q. At the far end or upstage in this picture, but at the bottom of the picture appears to be a piece of equipment, what is that equipment?
A. That is the forklift.
Q. So this is the forklift that was holding the crate up in the air?
A. Yes, it is.
Q. You're taking a picture of the underside of the crate?

A. Yes.
Q. Is there any damage depicted on this particular photograph?
A. Yes, there is.
Q. Can you help us identify where that damage is?
A. About the middle of the picture on the left-hand side, just above the fork.
Q. Are you speaking about this area?
A. Yes.
Q. All right. The bottom of this crate appears to have been made from pieces of lumber, is that correct?
A. Yes.
Q. Is this particular piece broken?
A. Yes, it is.
Q. Now, at this point in time when you were taking these photographs, have you opened the crate at all?
A. No, we haven't.
Q. Let's take a look at Exhibit 13. But before I do that, let me ask you about how the crate is constructed. You spent sometime in the parking lot, I presume, looking at this crate?

A. Yes.

Q. Could you see how the crate itself was constructed?

A. Yes.

Q. What type lumber, what size lumber, if you know?

A. There was a variety of 2 by 2's, 2 by 4's, large skid.

Q. Okay. How were the panels of the crate held together?

A. With screws and bolts.

Q. When you were trying to open the crate and took a look at it, was that a difficult task?

A. No, it was not.

Q. What did you do?

A. Basically, undid the screws with a wrench and a screwdriver and within a couple of minutes we had the panel off.

Q. Was there any lock on the package?

A. No, there was not.

Q. Were there any shipping bands, those metal type bands that might circle the crate that you'd have to cut through to open it?

A. No.

Q. Was there any -- do you remember any signs don't open the crate or anything of that sort?

A. No.

Q. So I take it that you did open the crate?

A. Yes, we did.

Q. All right. Let me show you what has been marked as Exhibit 13, and ask you if that picture is familiar to you?

A. Yes, it is.

Q. Do you know when it was taken?

A. 2/14/2003.

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Q. And where was it taken?

A. At Accu-Spec.

Q. And what does it depict?

A. It depicts the shelf on the opposite side of the keyboard.

Q. Okay. And this would be the same shelf that we looked at in Exhibit 4, is that right?

A. Yes.

Q. And does it also show where the crack is in the wall of the crate?

A. Yes.

Q. Where is that?

A. If you look back at the very dark area, you can see some white shining through.

Q. Would that be just about in the center of the photograph?

A. Yes.

Q. And that's a portion of the crack?

A. Yes.

Q. Mr. Carlson, this piece of equipment, I want to get a sense of how substantial it is. We know it's 5,200 pounds, 5,280 pounds, what are the walls of it made of?

A. There's steel and then a lead shield on the inside of that.

Q. And that shelf that we've looked at it, is that also made of steel?

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A. Yes, it is.

Q. Okay. Now, did you see damage that was in this Exhibit

13, damage to the very body of this X-ray machine?
A. Yes.
Q. And can you tell us where we would see that?
A. Right at the rear of the shelf where it attaches to the machine.
Q. In this particular area (indicating)?
A. Yes.
Q. Did the shelf actually push in the body of the machine, the steel body?
A. Yes.
Q. Okay. And this panel of the machine, I'm sorry, it doesn't come up for some reason -- I'm going to bring this up to you, Mr. Carlson, because I'm not getting a good image of that on the screen. But I'm going to have you look at Exhibit 13, is there above the shelf, is there a strip of steel that runs above the shelf so that you can see a seam between the main body and the face of the machine?
A. Yes.
Q. Was that disturbed in any way when you opened the crate, did you see it was altered in any way?
A. Yes.
Q. What do you see?

A. It is bent and, obviously, not the way it should have

been.

MR. DELANEY: Your Honor, I'm not getting a good image because of the light, may I approach.

THE COURT: Yes.

MR. DELANEY: I apologize about that.

BY MR. DELANEY:

Q. Mr. Carlson, this next photograph, it's not a really good image, this next one is 14, is it not, Exhibit 14 -- and is this familiar to you?

A. Yes, it is.

Q. What does it -- first of all, do you know when this one was taken?

A. Should have been that same day.

Q. What does it depict?

A. The damage to the opposite end of the shelf.

Q. If I'm standing in front of the shelf, is this, like I'm an operator, is this the right-hand side or the left-hand side of the shelf?

A. If you're facing the machine, it would be to your left.

Q. Thank you. And does this depict damage to the steel components of the machine itself?

A. Yes.

Q. This area, is that an indentation, is that damage or was that in the design of this?

A. No, that's damage.

Q. I'm not so sure it's depicted well in this image, this area of the face, is it distorted as a result of -- is it distorted or damaged?

A. Yes, it is.

Q. I'm going to show you Exhibit 15 and ask if that is familiar to you?

A. Yes, it is.

Q. Do you know when that was taken?

A. I believe it was that day.

Q. The 14th of February?

A. Yes.

Q. Is this also a picture of the X-ray equipment that arrived on that date?

A. Yes.

Q. Does this show damage?

A. Yes, it does.

Q. What is this particular black area with the circle in the lower left-hand corner of the picture?

A. It's the operator's shelf.

Q. Okay. Is this depicting the damage that was done?

A. Yes.

Q. On both the shelf and the member that goes vertically from the shelf?

A. Yes.

Q. Now, that's steel, is that right?

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A. Yes.

Q. Okay. I'm going to show you quickly this picture, which is Plaintiff's Exhibit 16, can you tell us if that's familiar to you?

A. Yes, it is.

Q. When was it taken?

A. That same day, I believe.

Q. February 14th?

A. Yes.

Q. Is this a picture of the X-ray machine?

A. Yes.

Q. Do you know of what portion of the machine this is?

A. Right, this would be the bottom left, looking at it from the front.

Q. All right, just to make sure -- let's go back to Exhibit 4. Is that 16 depicting the front portion of the machine, if you know?

A. Yes.

Q. And you think it's over on the left in this area?

A. Above the on and off switch, the yellow/red is the on and off switch, it's directly below that.

Q. Is this the on and off switch right here (indicating)?

A. Yes, it is.

Q. Let's go back to Exhibit 16. Is this depicting some damage?

A. Yes, it is.

Q. Tell us where that damage is?

A. Just to the left of the lifting strut.

Q. This is the lifting strut?

A. Yes.

Q. You're saying in this area (indicating)?

A. Yes.

Q. What's damaged?

A. It should be aligned, this obviously has been damaged.

Q. Thank you. Just a couple more. Exhibit 17, is that picture familiar to you?

A. Yes, it is.

Q. Can you tell us when that was taken?

A. 2/14/2003.

Q. All right. And what does it depict?

A. Damage to the pallet.

Q. All right. This is, of course, the crate of the machine that we're talking about, the X-ray machine?

A. Right.

Q. I'm going to show you two pictures, Mr. Carlson, 17 and 18 -- there's 18?

A. Okay.
Q. Let me ask you some questions about 18 first; is that
picture familiar to you?
A. Yes, it is.

Q. When was it taken?
A. Approximately 2/14/2003.
Q. And is it depicting the crate and equipment that arrived
from Dage?
A. Yes.
Q. And is 18 depicting damage as well?
A. Yes.
Q. What are 17 and 18 showing you?
A. They're showing that the machine actually penetrated the
pallet from the top down.
Q. From the floor. So we have a break out at the wall in
the front and a break through the floor as well?
A. Yes.
Q. All right.
MR. DELANEY: Your Honor, may I publish those two

pictures to the jury?

THE COURT: You may.

(Whereupon, Plaintiff's Exhibits 17 and 18 were published for the Jury.)

THE COURT: Retrieve the photos, please.

MR. DELANEY: Thank you.

BY MR. DELANEY:

Q. When you first saw the damage to the crate, even before these pictures were taken, what was the first thing you did?

A. I went in to get a camera.

Q. And when you come back out, is the Central Transport trucker still there?

A. No, he's not.

Q. Do you actually see him going down the road?

A. Going down the road, yes.

Q. Okay. At that point had there been a receipt signed?

A. Yes.

Q. Had Jim Mullen signed the receipt?

A. Yes.

Q. What did you do as soon as you learned that the truck had left and the receipt had been signed?
A. I told Jim to get on the phone with Logistics.
Q. So he called Logistics, to the best of your knowledge, he called Logistics?
A. Yes.
Q. Do you know if anyone, either from Logistics or Central Transport, came to Accu-Spec that day, February 14th, to examine the crate and the machine?
A. Yes.
Q. Do you know who it was that came?
A. Yes, George --
Q. Horetsky?
A. Horetsky.
Q. Were you there when the inspection occurred?
A. I was present but I don't think I interacted with them.

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Q. Do you know what happened to the crate and the machine that day, in terms of whether it came to your plant, whether it stayed in the parking lot or what happened to it?

A. It sat out in the parking lot, as well as the riggers, until a truck returned from Central and the riggers then loaded the machine back onto the truck.
Q. And do you know where they took it?
A. To Logistics warehouse.
Q. Do you know where that is?
A. I believe it's up off of Route 8 and 90.
Q. We didn't really clarify, did you open the crate and take those pictures that we looked at while it was in the parking lot or after it got to the Logistics warehouse, where were those taken?
A. Most of those were taken in the parking lot. I think there might have been one or two in there that may have been taken at Logistics warehouse when the inspector came.
Q. Okay. So did you have to reassemble the crate in order to put the machine back on to the Central Transport truck to move it to Logistics warehouse?
A. Yes.
Q. Was that a difficult task?
A. No, it was not.
Q. All right. In addition to asking Jim to call Logistics, did you make any effort or do you know if any effort was made

to talk with Dage on that same day, February 14th?
A. Yes, very quickly.
THE COURT: Keep your voice up, sir.
BY MR. DELANEY:
Q. Did you have any direct contact with Dage?
A. Yes.
Q. Okay. Did you think the machine was operable that day?
A. Did not know. It just appeared as sheet metal damage.
Q. Okay. What did the people from Dage tell you or advise you with regard to operation of the machine?
A. They said do not operate the machine.
Q. And why?
A. Because the lead shielding may have been compromised.
Q. What would be the impact if you turned the machine on?
A. Potentially fatal dose of radiation.
Q. Did the Dage people say anything about how this could be remedied or how it should be inspected or examined?
A. They suggested that they send an inspector from the UK to McKean to inspect the machine.

Q. Ultimately, did you agree to follow the instructions from Dage?
A. Yes, we did.
Q. Do you know how long that piece of equipment sat in the Logistics Plus warehouse?
A. I know the inspector came in April, I think it was the

first, second week of April, so from February through that portion of April.
Q. Did you get a substitute X-ray machine at all?
A. No, we did not.
Q. You paid for the machine, did you not?
A. Yes.
Q. Do you remember the name of the gentleman who came from Dage?
A. Yes, Peter -- the last name is escaping me. Peter Dunn.
Q. Do you remember how long he was in Erie?
A. I believe it was only for two days.
Q. And where did he examine the machine?
A. At the Logistics warehouse.

Q. All right. I'm going to show you what we marked as Plaintiff's Exhibit No. 19, and ask if that is a document with which you are familiar?

A. Yes.

Q. Could you tell us what this is?

A. It's Peter Dunn's report.

Q. It is a one-page document?

A. Yes.

Q. It's addressed to whom?

A. Jim Mullen at Accu-Spec.

Q. What is it dated?

A. Let me find it here -- April 16, 2003.

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Q. Okay. And I'm not going to have you go through this whole report. What does Mr. Dunn advise Accu-Spec to do, what's the last line of his letter?

A. "The best course of action would be to return the machine complete to the UK for repair and tests."

Q. Did you make a decision at Accu-Spec to follow that piece of advice?

A. Yes, we did.
Q. Do you know when the machine was sent to the UK?
A. Not precisely.
Q. I have some documents, some invoices I'll show you. Do you know when it came -- I won't even ask you that yet. In the process of talking with Dage, with talking with Central Transport, did you file a claim with Central Transport and Logistics with regard to this event and this damage?
A. Yes.
Q. Let me show you what we've marked as Plaintiff's Exhibit No. 20, and ask you if you are familiar with that two-page document?
A. Yes, I am.
Q. What is Exhibit 20?
A. Basically, it's a letter to Dage, PNC, Logistics Plus, Central Transport, discussing the damages that were accorded to the machine.
Q. Who wrote it?

A. Myself.

Q. You signed it on the second page?
A. Yes.
Q. In that letter -- you need a date on that letter, I'm sorry?
A. Yes, 2/21/2003.
Q. So this is just a week after you've seen the damage?
A. Approximately, yes.
Q. Do you know what the cost of repair will be at that point in time?
A. No, I do not.
Q. Do you have a number in there for the amount of damage?
A. I do not see anything.
Q. Okay. Now, did you think that you were going to get a response from Central Transport and Logistics Plus with regard to this letter?
A. Certainly hope to.
Q. Did they get back to you?
A. No.
Q. Did you ultimately inquire with Central Transport what are you going to do about this?
A. Yes.

Q. What did they say to you?

A. Well, it wasn't myself, I had asked Jim Mullen what was going on with the incident, and he contacted Central's claims

department and, basically, they said what case.

MR. COHEN: Your Honor, I'm going to object, we're going to have Mr. Mullen testify, Mr. Mullen will be available to testify, I believe that's hearsay.

THE COURT: Sustained.

MR. DELANEY: Thank you.

BY MR. DELANEY:

Q. Then did you subsequently receive a claim form from Central Transport with regard to this incident?

A. Yes.

Q. Let me show you what is Exhibit 21 -- what is Exhibit 21?

A. It's a damage claim to Central Transport.

Q. Did you have Mr. Mullen fill out this damage claim?

A. Yes.

Q. And it's Central Transport's form, is it not?

A. Yes, it is.

Q. What's the date of this particular claim?

A. April 4, 2003.

Q. And does it relate to the X-ray machine?

A. Yes, it does.

Q. What amount did you claim at that point?

A. $120,000, plus $980 in the riggers fee.

Q. Because you didn't, I take it you didn't know what the repair costs would be?

A. No, we did not.

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Q. Now, did you ultimately get a response from Central Transport with regard to that claim form?

A. Yes.

Q. Let me show you Exhibit 22, and ask you what that one page document is?

A. It is Central Transport's response.

Q. And what's the date of that response?

A. April 23, 2003.

Q. So this would be about 19 days after the claim form is dated, is that right?

A. Yes.

Q. And who signs it, by the way?

A. Jeff Cackowski.

Q. And he is, what title does the letter indicate?

A. Claims manager.

Q. Okay. And it's addressed to whom?

A. Mr. Jim Mullen.

Q. What does the first sentence of that letter say?

A. "We have conducted an investigation of your claim and have found no liability on our part."

Q. And why don't you read that next two sentences, the second paragraph?

A. "We hold a clear delivery receipt with no notation of any discrepancy at time of delivery. We also have no record of any discrepancy while this shipment while in our possession."

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Q. So the clear receipt, would that be referring to the receipt Jim Mullen signed while you were in getting the camera?

A. Yes.

Q. Is there any reference in this letter to the fact that

Central Transport's representative came out and saw the damage?
A. No.
Q. They say they did an investigation. To your knowledge, did they interview any people at Accu-Spec about this incident?
A. No.
Q. Did you ever learn that Central Transport contacted any people at Dage to investigate this incident?
MR. COHEN: Objection, leading, your Honor.
THE COURT: Overruled.
BY MR. DELANEY:
Q. Did it ever come your knowledge they ever contacted Rog's, the rigger, about this damage?
A. Not to my knowledge.
Q. Now, how about Logistics Plus, did they ever respond --
A. No.
Q. In writing?
A. No.
Q. How about verbally?
A. I know we had verbal communication, nothing that had any value to it.
Q. Let me show you what has been marked as Exhibit 23, this

is a package of documents, and I want you to take a moment and look through them and tell us if you are familiar with them?
A. Yes, I am.
Q. What is Exhibit 23?
A. Computation of damages.
Q. Is that something that -- the attachments, are those things that you provided to me to demonstrate the amount of expense incurred by Accu-Spec for repair?
A. Yes.
MR. DELANEY: Your Honor, I'm going to move for the admission of Exhibits 19 through 23 at this point.
THE COURT: They're admitted.
BY MR. DELANEY:
Q. Let's just put this on the screen, Mr. Carlson. The package of documents, does it have an invoice from Rog's Rigging?
A. Yes, it does.
Q. Did Accu-Spec pay that invoice?
A. Yes, we did.
Q. In terms of Mr. Dunn, he is the inspector from Dage?

A. Yes.

Q. What costs were incurred for his inspection?

A. Travel and lodging, meals.

Q. All right. Did Accu-Spec pay that?

A. Yes, we did.

Q. Repacking, this invoice from NNN Carting, is there an invoice in the package for that?

A. Yes, there is.

Q. Did Accu-Spec pay that sum of money to NNN Carting?

A. Yes, we did.

Q. Shipping to England. Is there in invoice for shipping the equipment to England?

A. Yes.

Q. And who do we pay for that, by the way?

A. Logistics Plus.

Q. All right. Did we pay it?

A. Yes, we did.

Q. The repair costs from Dage, $36,312, is there an invoice in the package for that?

A. Yes, there is.

Q. Did Accu-Spec pay that sum?

A. Yes, we did?

Q. The shipping back to the United States, $3,924.55, did we pay for that, did Accu-Spec pay for that shipping?

A. Yes, we did.

Q. And then U.S. Customs, are there invoices for Customs in the package?

A. Yes, there are.

Q. And did Accu-Spec pay for those invoices or pay for those Customs costs?

A. Yes, we did.

Q. What is the total amount then of Accuspec's claim?

A. $47,521.84.

THE COURT: How much more direct do you have?

MR. DELANEY: One question.

THE COURT: All right.

BY MR. DELANEY:

Q. Why send the equipment back to the UK, why not

investigate having it done having it repaired in the United
States?
A. The equipment manufacturer, Dage, did not have facilities here in the U.S. to perform that kind of repair and inspection. To send it anyplace else, other than Dage, would have voided our warranty with the machine. And the third issue was that if the lead shield was compromised, we simply weren't going to put our employees at risk of taking a fatal dose of radiation.
MR. DELANEY: That's all I have of this witness, thank you, your Honor.
THE COURT: Mr. Cohen.
MR. COHEN: Thank you, your Honor.

CROSS-EXAMINATION

BY MR. COHEN:
Q. Good afternoon.
A. Good afternoon.
Q. You testified that you were one of a group that went to

Chicago to the trade show to investigate these types of X-ray
machines, correct?

A. Yes.
Q. Who went with you?
A. George Ballard, our operations manager.
Q. Anybody else?
A. No, that was it.
Q. And you said at the trade show you saw different manufacturers of these X-ray machines, is that right?
A. Yes.
Q. Who were some of the other companies that manufactured these X-ray machines?
A. One was Glenbrook Technologies.
Q. Where were they located?
A. I do not know offhand.
Q. Do they have a U.S. location?
A. Yes.
Q. And what was another company that you maybe looked at?
A. I don't recall at this time.
Q. Is this a trade show where there are booths sort of set up?
A. Basically, different areas for different manufacturers.
Q. And do you remember who you spoke with at the Dage area

or booth?
A. Yes, I do.

Q. What was the name of that person?
A. Hal Hendrickson.
Q. Hal Hendrickson?
A. Yes, sir.
Q. What was Hal's title, did he have a title?
A. I believe he's the U.S. sales manager.
Q. Is Hal from England or from the U.S.?
A. He's a U.S. citizen, I believe.
Q. How much time did you spend with Hal at the trade show?
A. Probably an hour.
Q. Did they have a machine set up there?
A. Yes, they did.
Q. Was it an XL6500?
A. I believe it was.
Q. That's what the code of this one is, right?
A. Yes.
Q. Did he show you how it worked?

A. Oh, yes.
Q. When he operated this machine, you take a component, you put it in the device, the door closes and then it X-rays the piece of equipment in the box, is that how it works?
A. Basically, you open the door, you place your sample inside of it and close the door and then you have to, somebody has to program it to do what it's intended to do.
Q. How many times did you watch this particular machine do

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its stuff at the trade show?
A. Probably two or three times.
Q. How many people were at the trade show?
A. I do not know.
Q. Ballpark it, over 50?
A. Oh, yeah.
Q. Over 500?
A. Probably.
Q. Do you know if the Dage booth was busy, if you will, were people interested in this machine?
A. At the time we were there, we were the only ones in the

booth.

Q. At a certain point you said this is a gizmo we need to make sure our operations are better, you wanted to improve your operations, correct?

A. Yes.

Q. When did you decide you were going to buy the XL6500?

A. In December.

Q. In December, okay. When were you at the trade show?

A. I believe it was September or October.

Q. So when you decided you were going to buy the X-ray machine, who did you call?

A. Hal Hendrickson.

Q. How did the conversation go with Hal?

A. Well, we asked for a quote.

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Q. All right. Was it you on the phone or was it you and somebody else?

A. I was on the phone with Hal.

Q. All right, you asked for a quote in December, and what did Hal say?

A. He furnished me with a quote.

Q. How long did it take him to get you the quote?

A. I would imagine just a day or two, I do not precisely recall.

Q. And what was the quote?

A. $135,000.

Q. Did you tell Hal you needed the equipment within a certain timeframe?

A. No.

Q. Were there certain things you wanted to use the equipment for quickly?

A. We had potential for participating in a business that we would utilize the machine, but we did not have an order so we did not have a truly urgent nature.

Q. Okay. At a certain point Hal told you, listen, we have a machine in California, it's a demo, how about that, do you want that one, is that pretty much what he said?

A. Pretty much.

Q. And after that -- well, at that point, is that when he said we'll give it to you for $120,000?

A. He furnished us with a quote for that machine, yes.
Q. So the $120,000 quote was for the demo machine in California, correct?
A. Yes.
Q. And the original quote for a new machine from England was $135,000, correct?
A. Yes.
Q. So you got a $15,000 discount for buying a demo, is that fair to say?
A. Yes.
Q. Did you ask him how long the demo was in the, I'll call it the showroom in California -- how long it was on the floor in California?
A. I don't know if they actually used it in their facilities in California, but used it for trade shows.
Q. Did you ask him, well, it's a pretty expensive purchase, $120,000, how many times did you ship this around the country, the world, did you ask him that?
A. I believe that we did have a conversation about that.
Q. Did you learn the shipment history of this particular machine?

A. Not precisely, no.

Q. If you can explain the details of the conversation you did have regarding whether this machine went around to trade shows?

A. I don't recall exactly what was stated in the conversation, but I do recall that it didn't seem like it was anything unusual as far as usage or being transported a lot.

Q. Did you inquire with Hal -- well, Hal, it's a demo machine, how many times has it X-rayed things, how many times has it been operating?

A. He said it was slightly, you know -- used for demonstration. No production was done with the machine or anything like that.

Q. So, just correct me if I'm wrong, you said you were told that it was used for demonstrations at trade shows but not necessarily for demonstrations in the California location of Dage?

A. Not where it was physically sitting, that's what I seem to remember.

Q. Is it possible that Hal told you that it was used for
demonstration purposes in the location in California?
A. It could have been.
Q. Did you ask him how old the machine was?
A. I believe I did.
Q. And how old did he tell you the machine was?
A. I think it was just months.
Q. Months. Were you concerned a new model might be coming
out that you might want to wait for the new model?
A. No.

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Q. Now, you needed to get the machine from California to
your facility in Erie. Mr. Mullen was in charge of that,
right?
A. Yes.
Q. Mr. Mullen, your transportation coordinator?
A. He's the project manager.
Q. Is he the one who handles transportation issues at
Accu-Spec?
A. We don't regularly transport by truck.

Q. What do you usually transport by?
A. UPS.
Q. Does he handle those issues?
A. He was in charge of our shipping and receiving department, overseeing some of the things that we had going on back there.
Q. His responsibility was to get this thing from California to Erie, correct?
A. Yes.
Q. Were you present for any conversations that he had with Logistics Plus with respect to how it should be transported?
A. No.
Q. Aside from him telling you, do you know any of the specific information that he conveyed to Logistics Plus about how this thing was supposed to be transported?
A. No.

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Q. Did you know if he told Logistics Plus the complexity and value of this machine?
A. I do not know that.

Q. This is Plaintiff's Exhibit 1 -- there's a lot of different pieces of this thing -- this was all in the box, right?
A. Yes.
Q. The joggles board, the manipulator, the calibration plate, the micro switch, all this good stuff, that was all in the box?
A. Yes.
Q. Would you consider that a sophisticated piece of equipment?
A. Yes.
Q. A high value piece of equipment?
A. Obviously.
Q. Do you have any experience with the packaging of this type of freight?
A. No.
Q. So you've come to no conclusion as to whether or not proper bracing of the two-ton machine was used to hold steady the crate, is that correct?
A. It looked as if it should be sufficient.
Q. That's just based on your layman's knowledge of what you

saw that day, not any particular training, correct?

A. That's correct.
Q. Did you see any bracing inside the box at the top of the machine?
A. I don't recall that.
Q. This is P-13. Do you see any bracing up here (indicating)?
A. No, I do not.
Q. Do you see any bracing down here (indicating)?
A. No.
Q. You're saying that this is sheet metal, is that correct?
A. Yes.
Q. And this was pressed right up against the wall of the crate, is that correct?
A. And bulged the crate, yes.
THE COURT: Mr. Cohen, my court reporter and I think the jury is starting to run out of steam a little bit, we've been going for probably close to an hour and 40 minutes, how much more cross do you figure you have?

MR. COHEN: Not very much.
THE COURT: In terms of minutes how much more do you have?
MR. COHEN: Ten minutes.
THE COURT: All right, push ahead. You'll either finish or I'll let you finish tomorrow. Go ahead.
MR. COHEN: Thank you, your Honor.

BY MR. COHEN:
Q. You testified that when the freight was delivered, you saw damage to the crate, you went inside to get the camera and when you came back the trucker was gone, is that correct?
A. Yes.
Q. Did anyone tell the trucker to stay?
A. That was my point, yes.
Q. Who told the trucker to stay?
A. Nobody told him to stay, that was my point with Jim.
Q. So you were upset with Jim, Jim, why didn't you tell the guy to stay, did you say that?
A. I asked where he was, yes.

Q. And what did Jim say?

A. He said he took off.

Q. Then you said, Jim, didn't you tell him to stick around?

A. Obviously, yes.

Q. So the truck driver had a signed delivery receipt, so he left. He didn't take off, he left because he had delivered the freight, is that right?

A. I was inside the building, so I really don't know what transpired between him and Jim.

Q. Now, you testified also that a Central Transport truck came back to pick this thing up and move it to Logistics Plus warehouse, did you see the truck?

A. No, I did not.

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Q. Are you sure it was a Central Transport truck?

A. I presume it was. Because I believe that George actually made arrangements for the truck to pick the equipment up.

Q. You didn't see the truck?

A. I can't recall, no.

Q. Did you speak with George with regards to arrangements,

or how did you learn -- you're saying George made arrangements to pick it up again, who told you that?
A. Jim.
Q. You didn't hear that yourself with own ears?
A. No.
MR. COHEN: Move to strike.
THE COURT: Overruled, you asked him the question, you asked for the answer.
BY MR. COHEN:
Q. You testified that there was an engineer that was flown in, Peter Dunn from England --
A. Yes.
Q. To look at this. Did Mr. Dunn in e-mail correspondence indicate, before he even came over, that the machine should be shipped back to England?
A. I think they said potentially it should be, if any potential, if the lead shield was compromised. There is just no way of guaranteeing that.
Q. He said it's Dage pretty much, if the lead shield is

compromised -- if there's potential for the lead shield being
comprised, it should go back to England, is that what Dunn
said?
A. Yes.
Q. Why didn't you send it back to England without spending
$3,000 for Dunn to come and tell you that in person?
A. We had to assess the damage.
Q. Why couldn't it be done in England?
A. We wanted to get an estimate of what the damages were
going to be.
Q. If the estimate was too high, were you going to send it
to somewhere in the United States?
A. No, sir.
Q. What were you going to do with that information with
respect to whether it was done in England or whether it was
done in the United States?
A. We wanted to see exactly where we stood dollar wise.
Q. Could you have done that by just sending it to England
and having them send you a letter that said $36,000?
A. Probably could have been done.
Q. Did you investigate any possibility of sending it to
another manufacturer of X-ray equipment in the United States

locally?

A. Absolutely not.

Q. You didn't look into it at all?

A. No.

MR. COHEN: Thank you for much for your patience, your Honor, I have no further questions.

THE COURT: All right, very good. That's the end of the road for today, members of the jury. It's been kind of a long one. Let me remind you again, don't talk about the case. Obviously, it's important that you keep an open mind until the entire case is over and you get in the jury room, then you can start deliberating. We're going to stand in recess then, I'm going to ask that you be here -- who's from out of the county, anybody -- where are you from?

A JUROR: Elk County. But I'm going to stay over.

THE COURT: Good. I don't feel so bad in telling you folks to be here at 9 a.m. tomorrow, we're in recess until then.

(Whereupon, at 4:25 p.m., the Jury Trial proceedings were adjourned for the day.)

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C E R T I F I C A T E

I, Ronald J. Bench, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

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Ronald J. Bench